Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunities from Exemplary Damages?

JACK M. SABATINO*

In June 1995, a riot erupted at a crowded immigration detention facility in Elizabeth, New Jersey. The riot was sparked by the anger of more than 315 detainees who had endured months of deplorable conditions while confined there awaiting the outcome of their requests for political asylum. Among other things, the detainees allegedly had been arbitrarily beaten, strip-searched, and placed in solitary confinement; provided with soiled clothing, bad food, and forced to sleep with the lights on; and had seen their money, jewelry, and legal documents confiscated.[1] The uprising, which federal officials later described as the worst disturbance ever at a privately run immigration jail,[2] took over five hours to quell. Afterwards, the Immigration and Naturalization Service closed down the facility, citing poor management. The facility had been operated by a private corporation hired by the federal government.

In 1975, an aircraft owned and operated by the United States Air Force crashed while in the process of airlifting children out of Vietnam. One hundred fifty-five people died, including many orphans of American servicemen who themselves had been killed in combat. In subsequent litigation[3] filed by the estates and survivors of the decedents, the company that had designed and built the aircraft was blamed for causing the tragedy, through what the plaintiffs characterized as its knowing failure to correct numerous "grossly defective"

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* Visiting Associate Professor of Law, Rutgers-Camden Law School; B.A. 1979, Yale College; J.D. 1982, Harvard Law School. The author formerly served as the Director of the Division of Law of the New Jersey Attorney General's Office. The viewpoints expressed in this Article are the author's and should not be assumed to reflect the official position of the New Jersey Attorney General.

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[1] *See* Matthew Purdy & Celia W. Dugger, *Legacy of Immigrants' Uprising: New Jail Operator, Little Change*, N.Y. TIMES, July 7, 1996, at A1.

[2] See id.

[3] *See* Pray v. Lockheed Aircraft Corp., 644 F. Supp. 1289 (D.D.C. 1986) (approving $10 million settlement to victims and their estates).

and "obvious" mechanical and structural deficiencies.[4] The private company had built the aircraft under a contract with the United States Air Force.

From 1960 to 1972, experiments were conducted on at least eighty-seven people with cancer in which those patients, a majority of whom were racial minorities, were exposed to total or partial radiation without their informed consent. The tests were aimed at determining the psychological and physiological effects of excessive radiation exposure on humans. The radiation exposure caused bone marrow failure, pain, nausea, burns, and it cut short the lives of the unwitting test subjects. The experiments were designed and conducted by private researchers who had received funding under federal contracts and had been loosely supervised by two federal officials.[5]

On an early morning in June 1992, a teenage boy in a small Alabama city was killed when the car that he was driving in an unmarked road construction area hit a trench, lost control, and struck two large trees. The contractor that had been working on the site had left trenches in the road as big as three feet wide and up to eight inches deep. The teenager's parents sued the road contractor for wrongful death.[6] At trial the jury heard evidence that the defendant's superintendent had been made specifically aware of the dangers posed by the holes in the road prior to the accident, but had responded at the time: "I'm tired of the bitching about the road. We're going to take the cheapest way out."[7] The contractor was a private enterprise that had been hired by the city to perform the roadwork.

All of the above scenarios involve, to the extent the reported facts are true, what may be described as egregious behavior. In each of those instances the wrongful behavior in question centrally includes conduct by government contractors. Persons injured by that conduct sued the private contractors (at times also naming as defendants the government itself and various public officials) to obtain redress. Through such litigation, the private entities that had been engaged to carry out the public's business and to fulfill public needs could have been held accountable for their failures.

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[4] *See id.* at 1293.

[5] *See In re* Cincinnati Radiation Litig., 874 F. Supp. 796, 801 (S.D. Ohio 1995) (denying defendants' motions to dismiss). The case eventually settled for $4.25 million.

[6] *See* Lemond Constr. Co. v. Wheeler, 669 So. 2d 855 (Ala. 1995) (upholding $3.5 million punitive damages verdict against road contractor).

[7] *Id.* at 863 (internal quotation marks omitted). The majority of the Alabama Supreme Court relied on this evidence to support their conclusion that there was ample proof that the defendant had engaged in sufficiently "wanton" conduct to justify the punitive damages award, *id.* at 862–63; a dissenting justice found the evidence only indicative of negligent conduct and also concluded that the court below had failed to take into proper account the plaintiff's contributory negligence, *see id.* at 866–70 (Houston, J., dissenting).

The accountability of government contractors takes on heightened importance in a time when it has become more commonplace for government agencies to "privatize" parts of their activities through contracts. As public entities continue—for reasons of efficiency, political philosophy, or otherwise—to spin off more and more of their functions to private enterprises, the need to monitor such enterprises in their handling of those public duties elevates. Unlike elected politicians, private contractors are at least one step removed from the democratic process and are apt to be more attentive to their own bottom-line financial success than they are to catering to the popular will. For a host of reasons, government itself is prone to do an inadequate job in supervising those hired firms. Accordingly, litigation brought by persons whom government contractors have injured can help discourage the kind of irresponsible contractor behavior depicted in the above scenarios.

A significant issue that arises in private lawsuits against government contractors is the proper scope of liability and how those liability principles might or should differ from those that apply to the government itself. If the government had directly engaged in the conduct at issue, it might be protected from liability as a matter of law under various facets of sovereign immunity. Sometimes the law has derivatively extended those immunities to private parties acting as agents of the government, treating such agents like the sovereign itself for certain liability purposes.[8]

There is a well-developed body of law that speaks to these liability matters, detailing the circumstances in which government contractors can be deemed civilly responsible to either the public agencies that hire them (under contract law)[9] or, alternatively (under tort or other legal doctrines), to third parties harmed in some way by the contractor's behavior.[10] Less well-developed,

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[8] *See supra* notes 71-88 and accompanying text.

[9] *See generally* JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 901–96, 1239–1316 (3d ed. 1995) (surveying law concerning terminations of federal contractors in default and the resolution of agency and contractor disputes); JOHN COSGROVE MCBRIDE, GOVERNMENT CONTRACTS: CYCLOPEDIC GUIDE TO LAW, ADMINISTRATION, PROCEDURE chs. 31, 33, 35A, 39 (1996) (discussing government contract breaches, reprocurement, terminations for contractor default, and various defenses).

[10] *See, e.g.*, Boyle v. United Techs. Corp., 487 U.S. 500, 513–14 (1988) (applying so-called "government contractor defense" to limit liabilities of government contractors to injured third parties). There tends to be much more focus on the legal relationships between government and its contractors *inter sese* than about such contractors' duties to members of the public. For example, a 578-page reference book published in 1993 about federal contractor law devotes a full 98-page chapter to remedies of the contractor against the government and of the government against the contractor, but only tangentially refers to private litigation against such contractors in an eight page discussion of the False Claims Act.

however, is the law that specifies the appropriate remedy to redress the contractor's misfeasance or nonfeasance.[11] In particular, the theoretical focus here is aimed at one strand in that bundle of potential remedies: punitive damages. This Article specifically examines whether a government contractor can and should be liable for such punitive damages to a third party that it has harmed in the course of its work for the public, in situations where the contractor's behavior is willful, wanton, or otherwise sufficiently extreme to satisfy the usual legal standards for awarding such exemplary relief.

Public entities have been frequently insulated by the notion, expressed both in statutes and case law, that the remedy of punitive damages may not be assessed against the government itself.[12] This traditional, albeit not universal, punitive damages immunity is founded upon both substantive and fiscal rationales arguably unique to governmental defendants.[13] But when the defendant actor is not the sovereign but rather a private, profit-maximizing enterprise under contract to the sovereign, should that immunity from punitive damages be stretched further to cover the contractor? For reasons explored in this Article (and which have yet to be well developed in any extant case law, statutory provisions, or scholarship), such immunity ought not be shared with government contractors. To the contrary, exposing government contractors to punitive damages under the same terms that they are exposed to such liabilities for egregious conduct in their everyday private sector affairs can help foster the essential goal of accountability—accountability not only to the government, but also to the very public that is supposed to benefit when a public function is privatized. The prospect of such exemplary liability should strengthen the legal incentives for profit-seeking government contractors to do the public's work properly.

Part I of this Article initially examines the current trend toward privatization and explains why the accountability of the private entities that are

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See JOHN W. WHELAN, UNDERSTANDING FEDERAL GOVERNMENT CONTRACTS 559–67 (1993).

[11] For example, McBride's comprehensive multivolume treatise on government contracts devotes only two of its 53 chapters to damages, and virtually all of that discussion concerns the damages recoverable by the government from a contractor or by a contractor from the government. *See* MCBRIDE, *supra* note 9, chs. 32, 34; *see also* CIBINIC & NASH, *supra* note 9, at 1191–1209 (focusing "remedies" section in reference book upon contractor remedies and government remedies rather than upon third-party remedies); GOVERNMENT CONTRACT LAW: THE DESKBOOK FOR PROCUREMENT PROFESSIONALS (ABA Section of Public Contract Law, 1995) 275–93, 377–85, 403–18 (devoting only two pages of a 436-page "deskbook" on government contracts (pages 415–16) to the role of private suits against contractors under False Claims Act, with no discussion of other private theories of recovery).

[12] *See supra* notes 111–35 and accompanying text.

[13] *See supra* notes 63–70 and accompanying text.

hired to perform "outsourced" public functions is of special importance. Before specifically evaluating punitive damages as a potential accountability enhancing device in such privatized contexts, two separate concepts are explored in Parts II and III and then brought together in Part IV. Part II reviews the government's own liability or immunity under civil law principles when it causes harm to others. That discussion also examines circumstances where private contractors hired by the government have received, by extension, some of the sovereign's immunity protections. Part III then addresses the general rationale for imposing punitive damages on private sector actors, as contrasted with the traditional immunity of public entities from such penalties. Finally, Part IV blends those analyses to answer the central question posed herein: whether private entities engaged in contracted out governmental activities should derivatively share the sovereign's immunity from punitive liability.

I. OUTSOURCING GOVERNMENTAL NEEDS AND SERVICES: THE DRIVE TO PRIVATIZE

A. *The Expanding Use of Government Contracts*

Public officials in the United States have increasingly been looking to contract with the private sector to carry out all or parts of certain activities customarily performed by public employees.[14] This interest in privatizing services and other governmental functions through contracts has escalated at all levels of government. The United States is expanding its already immense procurement role, moving to contract out—either for the first time or on a more frequent basis—such diverse items as facilities and equipment, data processing, training, regulatory inspections, and even background investigations on appointees to certain federal offices.[15] States are privatizating, inter alia,

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[14] A recent study by the University of Pittsburgh's Graduate School of Public Health and International Affairs determined that about 30% of government services throughout the United States are carried out via private contractors. *See* Mark Platte, *Angling for a Piece of the Action*, L.A. TIMES, May 4, 1995, at A1 (reporting on University of Pittsburgh study); *see also* Rowan Miranda & Karlyn Andersen, *Alternative Service Delivery in Local Government: 1982-92*, MUNICIPAL YEAR BOOK 26 (1994) (detailing results of national surveys by International City/County Management Association in 1982 and 1992 of more than 4900 United States cities and counties and finding that the outsourcing of functions to private vendors through government contracts was a popular and widespread alternative to the delivery of many public services by local government employees).

[15] Privatization at the federal level has largely proceeded under what is known as Office and Management Circular A-76. This document, first issued in 1966, admonishes federal agencies, subject to some major exceptions, to use outside contractors for commercial services where doing so would be at least 10% less expensive than if those services were

prisons, recreational facilities, transportation, and various social services.[16] Cities and other localities are likewise outsourcing public works, health care,

directly provided by the government. *See* Performance of Commercial Activities, 61 Fed. Reg. 14,338, 14,338–46 (1996) (re-adopting and amending in other respects, OMB Circular A-76); *see also* Janet Rothenberg Pack, *The Opportunities and Constraints of Privatization, in* PRIVATIZATION AND ITS ALTERNATIVES 281, 296–98 (William T. Gormley, Jr. ed., 1991).

Since 1993, Vice President Gore has headed an ongoing process known as the National Performance Review (NPR), which has been studying ways to "re-invent" the federal government through making agencies and programs more efficient and more focused on serving the needs of their "customers." Some of the NPR's recommendations have included the full or partial privatization of various federal governmental operations. *See, e.g.*, AL GORE, NATIONAL PERFORMANCE REVIEW, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS 56–94 (1993) [hereinafter 1993 NPR REPORT] (recommending, among other things, eliminating the Government Printing Office's monopoly on printing for federal agencies; allowing federal agencies to lease space directly through private real estate companies; contracting out National Oceanic and Atmospheric Administration's nautical charting work to private firms; contracting out noncore Defense Department functions such as data processing, billing, and payroll; contracting out Job Corps training centers that have been run exclusively by Agriculture and Interior Departments; restructuring the federal Air Traffic Control System into an independent federal corporate entity supported by user fees; authorizing Department of Housing and Urban Development to form limited partnerships with private real estate firms to manage and sell defaulted rental properties; utilizing some private firms to conduct safety inspections as supplement to inspections by Occupational Safety and Health Administration); *see also* AL GORE, NATIONAL PERFORMANCE REVIEW, COMMON SENSE GOVERNMENT WORKS BETTER AND COSTS LESS 7, 120, 121, 123, 127, 128, 132, 134 (1995) [hereinafter 1995 NPR REPORT] (further recommending privatization of such diverse federal activities as Sallie Mae and Connie Lee loan programs; NASA spacecraft communications; Commerce Department seafood inspections; specialized National Weather Service functions; firefighter training; management of National Institutes of Health clinical center; supply and equipment acquisitions by federal intelligence agencies; and Labor Department penalty and debt collection services). The NPR recommendations also include simplifying procurement regulations in order to facilitate contracting out by federal agency managers. *See* 1993 NPR REPORT, *supra*, at 26–31, 156; *see also* AL GORE, NATIONAL PERFORMANCE REVIEW, CREATING A GOVERNMENT THAT WORKS BETTER AND COSTS LESS, STATUS REPORT 51–54 (1994) [hereinafter 1994 NPR REPORT]. Another measure recommended in the NPR studies was launched—amid much controversy—by the Clinton Administration in 1996: privatizing background security checks for many federal offices. *See* Richard W. Stevenson, *Clinton Proceeds with Plan to Privatize Security Checks*, N.Y. TIMES, July 2, 1996, at A1.

[16] For example, California has leased the median on its State Highway Route 91 to a private company that has built a new four-lane toll road in the middle of the state-run freeway. *See* Marianne Lavelle, *Public Works Go Private*, NAT'L L.J., Sept. 25, 1995, at A1. Massachusetts has replaced several state hospitals with private care providers, and has hired private firms to manage state skating rinks and zoos as well as to help enforce its automobile lemon laws. *See* Peter J. Howe, *Unions to Fight Push to Go Private*, BOSTON GLOBE, Mar.

building security, and a plethora of other governmental needs and services.[17] Proponents of these measures believe that private enterprises can deliver particular services and create specific goods for the benefit of the citizenry more efficiently than government workers.[18] They also contend that having

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22, 1992, at 29. New Jersey has privatized the operation of 26 motor vehicle licensing agencies and medical care for the state's more than 20,000 inmates and has considered hiring private vendors to run a state veterans home and perform other functions. *See* Bill Sanderson, *Whitman Pitches the Benefits of Privatizing*, BERGEN RECORD, Oct. 29, 1995, at 1. The state of New York established a commission on privatization that, among other things, considered selling off the World Trade Center and two major airports. *See* Elizabeth Moore, *Doling out Services: The Push for Privatization Is Strong But Will Unions, Taxpayers Stand for It?*, NEWSDAY, Apr. 15, 1996, at C1.

On a national basis, the 1996 welfare reform law is expected to result in billions of dollars in private contracts through which state governments will outsource the administration of their federally-funded welfare programs. *See* Nina Bernstein, *Giant Companies Entering Race to Run State Welfare Programs*, N.Y. TIMES, Sept. 15, 1996, at A1.

[17] A 1987 survey by the Touche-Ross firm revealed that 99% of all local governments had contracted out some services within the past five years. *See* William T. Gormley, Jr., *The Privatization Controversy*, *in* PRIVITIZATION AND ITS ALTERNATIVES, *supra* note 15, at 3, 4. An earlier survey of 1780 county and municipal governments in 1982 showed that, on average, each surveyed jurisdiction fully or partially contracted out 27% of some 59 enumerated services, including such diverse items as vehicle towing, EMS/ambulance services, insect/rodent control, hospital management, public works, and transportation. *See* CARL F. VALENTE & LYDIA D. MANCHESTER, RETHINKING LOCAL SERVICES: EXAMINING ALTERNATIVE DELIVERY APPROACHES, Table B, at xv (1984), *summarized in* E.S. Savas, *Privatization and Prisons*, 40 VAND. L. REV. 889, 890-92 (1987) [hereinafter Savas, Privatization and Prisons]. Another study by the Mercer Group, a management consulting firm, found that between 1987 and 1995 the number of local governments that privatized bill collection, jail food services, ambulance, health and medical services, and street maintenance services had *doubled*. *See* Platte, *supra* note 14, at A1.

A number of counties and cities in the 1990's have embarked on major privatization initiatives. *See, e.g.*, Platte, *supra* note 14, at A1 (reporting that Orange County, California plans to privatize a host of activities, including its local airport; that Chicago has privatized 35 services, including sewer maintenance, health care, and water billings; that Indianapolis has turned over 50 city services, including trash collection and waste water treatment, to private suppliers; and that Philadelphia has privatized over 19 tasks, including street maintenance and museum security); Lavelle, *supra* note 16, at A1 (noting that flood control authority of Ohio's Great Miami Valley has divested its waste water system for nearly $7 million, and that Petaluma, California, Toledo, Ohio, Wilmington, Delaware, and West New York, New Jersey are considering similar actions); Moore, *supra* note 16, at C1 (describing New York City's efforts to privatize its public hospitals, housing, welfare services, jails, and a public TV station).

[18] *See, e.g.*, CHARLES H. LOGAN, PRIVATE PRISONS: CONS AND PROS (1990); PRESIDENT'S COMMISSION ON PRIVATIZATION, PRIVATIZATION: TOWARD MORE EFFECTIVE

private contractors do some of government's work can exert beneficial competitive pressures on the public agencies that directly perform the balance of that work.[19] Critics of the privatization trend, on the other hand, think that its financial benefits are often illusory or exaggerated. They warn that important values such as quality, safety, integrity, and accountability will be compromised when public services are entrusted to profit-maximizing private actors.[20]

GOVERNMENT (1988); THE PRIVATE SECTOR IN STATE SERVICE DELIVERY: EXAMPLES OF INNOVATIVE PRACTICES (Valerie Nelkin ed., 1989); PRIVATIZATION: THE PROVISION OF PUBLIC SERVICES BY THE PRIVATE SECTOR (Roger L. Kemp ed., 1991); PUBLIC SERVICE PRIVATIZATION: ALTERNATIVE APPROACHES TO SERVICE DELIVERY (Lawrence K. Finley ed., 1989); E.S. SAVAS, PRIVATIZATION: THE KEY TO BETTER GOVERNMENT (1987) [hereinafter SAVAS, PRIVITIZATION]; E.S. SAVAS, THE PUBLIC SECTOR: HOW TO SHRINK GOVERNMENT (1982) [hereinafter SAVAS, THE PUBLIC SECTOR]; Stuart Butler, *Privatization for Public Purposes*, *in* PRIVATIZATION AND ITS ALTERNATIVES, *supra* note 15, at 17; Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449 (1988); Robert M. Spann, *Public Versus Private Provision of Governmental Services*, *in* BUDGETS AND BUREAUCRATS: THE SOURCES OF GOVERNMENT GROWTH 71 (Thomas E. Borcherding ed., 1977); Paul R. Verkuil, *Reverse Yardstick Competition: A New Deal for the Nineties*, 45 FLA. L. REV. 1 (1993).

[19] This motivation factor is a main argument advanced in favor of educational vouchers, based on the supposition that offering parents the alternative of publicly funded private schools will induce public schools to perform better. *See, e.g.*, Dwight R. Lee, *Vouchers—The Key to Meaningful Reform*, *in* PRIVATIZATION AND ITS ALTERNATIVES, *supra* note 15, at 39, 47–49. In a report to Congress on the private management of public school districts in four localities, the General Accounting Office (GAO) found that, despite mixed results obtained, the private vendors "have served as catalysts for [the] school districts' rethinking and challenging the status quo." U.S. GENERAL ACCOUNTING OFFICE, PUB. NO. GAO/HEHS-96-3, PRIVATE MANAGEMENT OF PUBLIC SCHOOLS: EARLY EXPERIENCES IN FOUR SCHOOL DISTRICTS 28 (1996) [hereinafter GAO/HEHS-96-3]. Although not across-the-board advocates of privatization, David Osborne and Ted Gaebler have noted the beneficial impact of selective privatization in stimulating ways to re-invent the delivery of governmental services. *See* DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 16–24 (1992).

[20] *See, e.g.*, Ronald C. Moe, *Exploring the Limits of Privatization*, 47 PUB. ADMIN. REV. 453, 457–58 (1987); Jonas Prager, *Contracting-Out: Theory and Policy*, 25 N.Y.U. J. INT'L L. & POL. 73, 103–11 (1992); Paul Starr, *The Case for Skepticism*, *in* PRIVATIZATION AND ITS ALTERNATIVES, *supra* note 15, at 25; Harold J. Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 PUB. ADMIN. REV. 461, 464–66 (1987); Carl E. Van Horn, *The Myths and Realities of Privatization*, *in* PRIVATIZATION AND ITS ALTERNATIVES, *supra* note 15, at 261. There are also concerns that the public may be denied important information about contracted-out government programs. *See* Bill Kovach, *When Public Business Goes Private*, N.Y. TIMES, Dec. 4, 1996, at A29 (describing how certain government contractors have restricted media contacts, while others have obtained exclusive contractual rights to disseminate public data).

The concept of delegating governmental functions and the fulfillment of public needs to private vendors is not, of course, a 1990's innovation. Throughout American history, the federal government and its state and local counterparts have frequently hired outside contractors to perform designated tasks.[21] Government procurement, particularly with respect to national defense, has taken on enormous dimensions.[22] Traditionally, privatization has been more common in filling governmental needs for physical items (such as producing military hardware, supplying office desks, and constructing roads and bridges) as opposed to providing human services (such as teaching public schools, counseling welfare recipients, or conducting regulatory inspections) needed by government to carry out its public mission.[23] For example, a 1987 Touche-Ross survey of cities and counties indicated that while 59% of the local governments surveyed had hired private contractors for solid waste collection or disposal and 43% had contracted out for buildings or grounds, only 5% of them had contracted out for child care or day care services, and only 12% had done so for services to the elderly or the handicapped.[24]

To be sure, the extent that government is perceived to be privatizing public functions depends on one's notions of what functions belong to the government in the first place. As the programmatic responsibilities of American government

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[21] The federal judiciary recognized early on the inherent power of the United States government, later codified in various procurement statutes, to contract with private parties in carrying out its duties and in exercising its powers. *See* United States v. Tingey, 30 U.S. (5 Pet.) 115, 128 (1831); United States v. Maurice, 26 Cas. 1211, 1216–18 (C.C.D. Va. 1823) (No. 15,747). *See generally* REPORT OF THE COMMISSION ON GOVERNMENT PROCUREMENT, APPENDIX G: HISTORICAL DEVELOPMENT OF THE PROCUREMENT PROCESS 163–84 (1972). Contracting out has also been a long standing practice at the state and local levels. As one historical illustration, Malcolm Feeley has traced the development of state-leased private prisons in the nineteenth century in Kentucky and other southern and western states. *See* Malcolm M. Feeley, *The Privatization of Punishment in Historical Perspective*, *in* PRIVATIZATION AND ITS ALTERNATIVES, *supra* note 15, at 199, 212–15.

[22] In the defense arena, for instance, the Pentagon awarded $116 billion in new prime contracts to private firms furnishing military supplies, services, or construction in the United States for the fiscal year ending September 30, 1993. *See* U.S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, Table 548, at 356 (1995).

[23] *See, e.g.*, SAVAS, PRIVATIZATION, *supra* note 18, at 121 (distinguishing between privatization of "physical and commercial services" versus less-common privatization of "protective and human services"); Janet Rothenberg Pack, *Privatization of Public-Sector Services in Theory and Practice*, 6 J. POL'Y ANALYSIS & MGMT. 524–25 (1987) (noting that privatization has tended to concentrate in the area of "intermediate" rather than "final" goods and services).

[24] *See* TOUCHE-ROSS, PRIVATIZATION IN AMERICA 10 (1987), *excerpted in* PRIVATIZATION AND ITS ALTERNATIVES, *supra* note 15, at 9.

have expanded in this century to meet societal needs,[25] so too have the operations of government enlarged, at least until recently, to carry out those responsibilities.[26] Given the longstanding role that American government undeniably plays in so many subject areas today, it is difficult to draw clear or useful distinctions between so-called "traditional" or "core" governmental functions and "nontraditional" or "peripheral" ones.[27] There is widespread and dynamic variation, particularly at the state and local levels, as to which public services are provided by private firms and which ones are performed by government employees.[28] The logic of attempted classifications is also undermined when one considers the experiences of less market-oriented countries where state-owned and state-operated functions are more prevalent.[29]

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[25] Consider, for example, Social Security, Medicare and Medicaid, modern-day defense, national security, and intelligence programs, federal highways, aviation regulation, the National Labor Relations Act, the Superfund program and other environmental measures, food and drug regulation, government-subsidized housing, nuclear regulation, narcotics law enforcement, the space program, occupational safety and health regulation, federal antitrust and trade regulation, securities and banking regulation, civil rights, and legal services for the poor, just to list a few at the federal level.

[26] In parallel manner tracking the growth of government's role, a host of federal departments and agencies were created (or reorganized from prior governmental units) in the twentieth century to carry out those new functions. For example, the following federal agencies were launched to implement the activities corresponding to the programs listed in the preceding footnote: the Social Security Administration, the Department of Health and Human Services, the Department of Defense, the National Security Council, the Central Intelligence Agency, the Federal Highway Administration, the Federal Aviation Administration, the National Labor Relations Board, the Environmental Protection Agency, the Food and Drug Administration, the Department of Housing and Urban Development, the Nuclear Regulatory Commission, the Drug Enforcement Agency, the National Aeronautics and Space Administration, the Occupational Safety and Health Administration, the Federal Trade Commission, the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Equal Employment Opportunity Commission, and the Legal Services Corporation. The proliferation of new agencies also has occurred in state and local governments in recent decades.

[27] *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539–47 (1985) (repudiating analysis that would attempt, for purposes of defining the scope of residual state powers under the Tenth Amendment, to distinguish "integral" or "traditional" state governmental functions from "nonintegral" or "nontraditional" ones); *see also* Indian Towing Co. v. United States, 350 U.S. 61, 64–68 (1955) (rejecting efforts to identify "uniquely" governmental functions for purposes of ascertaining scope of governmental tort immunity).

[28] *See, e.g.*, Miranda & Andersen, *supra* note 14, at 28–29 (describing numerous variations in contracting out among public entities over different time periods); Savas, Privatization and Prisons, *supra* note 17, at 890–95 (same); Platte, *supra* note 14, at A1 (same).

Accordingly, this Article does not attempt to inventory our own government's pervasive activities and place them into neat cubbyholes. Rather, it examines facets of the privatization of the governmental status quo without reviewing how government got into that particular activity in the first place, or whether that activity legitimately "belonged" under government's control. The analysis thus presumes that there was some legal basis—whether it be legislation, executive order, or constitutional mandate—that authorized government to have responsibility for the particular functions under discussion.

Privatization itself can take on many forms, ranging from what has been described as the "load-shedding" of an existing governmental operation (where the means of financing and delivering a public good or service are turned over entirely to the private sector) to the contracting out of specific public tasks or needs (where the government relies on private vendors but still keeps ultimate control and responsibility over the activity).[30] This Article focuses on the latter: scenarios where government uses its contracting powers to engage one or more private entities to perform designated tasks. Although at times such government contracts are also formed with nonprofit organizations, the discussion below is confined to the more typical scenario in which the "outside contractor" is a for-profit commercial enterprise.

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[29] The United Kingdom, for example, has a history of much greater state ownership and operational control of what are customarily private functions in the United States. The more recent initiatives of the Thatcher and Major Governments to privatize government-run functions in the United Kingdom such as telephone service and the national airline are well known, and have been replicated elsewhere. *See, e.g.*, *Competing for Quality: Buying Better Public Services*, *in* HER MAJ. TREAS. REP., 1991, CMND 1730; V.V. Ramanadham, *Privatisation: The U.K. Experience and Developing Countries*, *in* PRIVATISATION IN DEVELOPING COUNTRIES 53 (V.V. Ramanadham ed., 1989). Data gathered by the World Bank shows that almost 7000 governmental enterprises were privatized worldwide between 1980 and 1991, predominantly in the former East Germany and other former Communist bloc countries. *See* Mary M. Shirley, *The What, Why, and How of Privatization: A World Bank Perspective*, 60 FORDHAM L. REV. S23, S24, S33 (1992).

[30] *See* Marc Bendick, Jr., *Privatizing the Delivery of Social Welfare Services: An Idea to Be Taken Seriously*, *in* PRIVATIZATION AND THE WELFARE STATE 97, 98–99 (Sheila B. Kamerman & Alfred J. Kahn eds., 1989).

B. *Contractor Accountability: Three Senses and Multiple Concerns*

A key concern in contractually shifting governmental functions or needs to the private sector is the accountability of the firms hired to perform that work. Such accountability is vital in at least three senses. First, there is the direct contractual accountability of the private entity to the government pursuant to the terms and conditions of its procurement agreement.[31] Second, there is the accountability of the contractor to the citizens that directly "use" the vendor's services or products, such as the commuters who ride privately-run public buses, the inmates who are housed in privatized jails, or the homeowners whose curbside waste is collected by municipally contracted carting firms. Third, there is the ultimate political accountability of the contractor and the government itself to the public at large, in discharging a public function effectively and at a fair cost to the taxpayers. Under this last meaning of the term "accountability," it does not matter that many citizens do not directly use the privatized service in the same way as the hypothetical commuter, inmate, or homeowner in the second category. The private vendor nevertheless must be accountable to *all* members of the community that are indirectly benefited or harmed, tangibly or intangibly,[32] by the provision of the service. In using the

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[31] The accountability of the private vendor may also influence the accountability of the governmental agency that hires it or that, in some manner, competes with it. In this vein, the private vendor hired to run the Minneapolis School District observed, in a published letter commenting on the GAO's study of that privatized district, that "the really interesting question is not public vs. private management, but what strategies are best pursued in public education today such that these systems can and will be *accountable* for achieving their purpose." Letter from Laurie Ohrmann, Vice President, Public Strategies Group, Inc. to Cornelia M. Blanchette, Associate Director, Education and Employment Issues, GAO/HEHS-96-3, *supra* note 19, at 74 (emphasis added). Ms. Ohrmann further asserted to the GAO that her firm's "willingness to hold [it] *accountable* for the results it produces for the district is a key to building the same *accountability* throughout the rest of the system, with teachers in their classrooms, with principals in their schools and with parents and community members outside the school day." *Id.* (emphasis added).

[32] There are often indirect benefits that persons derive from the effective delivery of a governmental service, whether that service is provided by government itself or by a government contractor. For example, a motorist driving her car may indirectly benefit from less-congested streets as the result of others riding privatized city buses; a would-be crime victim may indirectly benefit from a private firm's secure management of a state prison; and a landowner may indirectly benefit from the health and environmental hazards avoided through timely and effective privatized trash collection at her neighbor's house. There also can be significant moral benefits in citizens simply knowing that vital public services, such as programs for children, the poor, and the elderly, are being capably provided by a private vendor, even though many citizens may never personally avail themselves of such services. Likewise, there are indirect *harms* inflicted on people when a government service is provided

term "accountability" in this Article, I include all three of these important meanings.

Accountability derives from the very underpinnings of a representative democracy.[33] The citizens have consensually entrusted the government to carry out certain tasks for their overall benefit. If the government fails to discharge those assignments capably, the citizens have the opportunity to show their displeasure through the ballot box by electing new public officials in the executive and legislative branches to replace their failed predecessors.[34] However, when we privatize governmental functions through contracting out, the control of public functions alarmingly may become too removed from such democratic oversight.[35] Private companies are not chosen by voters to undertake public functions. They are hired, not elected. Such firms' responsibilities to the public they serve thus are not measured by popular will. Rather, they are regulated by the specifications in their respective procurement contracts, and otherwise by the general rule of law. In carrying out those responsibilities in lieu of the state itself, private contractors must be accountable, or the public will be shortchanged.

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*in*effectively. These harms may include such things as the physical harm to persons and property run over by a privatized city bus, environmental harms from leaky garbage dumpsters used by municipally contracted trash collectors, or economic harms caused by the unfair conduct of a business hired to manage specified public works.

[33] James Q. Wilson has listed accountability as one of the key concerns of government, along with equity, fiscal integrity, and efficiency. *See* JAMES Q. WILSON, BUREAUCRACY: WHAT GOVERNMENT AGENCIES DO AND WHY THEY DO IT 316 (1989). Accountability can help advance those other objectives, or perhaps stated more obviously in the negative, a lack of accountability over governmental services can breed inequity, corruption, and inefficiency.

[34] Undoubtedly, the electoral process itself can be ineffective in promoting the accountability of public officials. *See infra* note 115 and accompanying text. Nevertheless, when public officials contract out their work to private companies, the potential corrective influence of the electoral process is even further lessened.

[35] As Osborne and Gaebler have observed, accountability is also crucial even where government chooses not to go so far as to privatize its functions but simply decentralizes them out to smaller units of government or down to lower-tier civil servants. In such scenarios, it is important that the public agencies that are delegating their powers "articulate their missions, create internal cultures around their core values, and measure results." OSBORNE & GAEBLER, *supra* note 19, at 254. According to Osborne and Gaebler, replacing authoritarian governmental cultures bound by strict internal bureaucratic rules with "loose-tight" cultures that allow more flexibility in attaining clearly-defined public objectives will help assure that "[a]ccountability for inputs gives way to accountability for outcomes." *Id.*; *see also* THOMAS PETERS & ROBERT WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES 15–16, 318–25 (1982) (praising loose-tight management techniques that simultaneously encourage innovation and autonomy by lower-echelon workers while maintaining adequate centralized controls over organization's direction).

As Carl Van Horn has observed, "Fears about the lack of accountability for service delivery [are] a principal impediment to new privatization ventures."[36] These accountability concerns are particularly acute in contracting out governmental social services, a realm in which outcomes are more difficult to measure than for physical services and where the risks of failure may be more serious.[37] The privatization of linen supplies for a public veterans hospital, for example, may be more readily evaluated by contract standards that detail such things as the quantities and dimensions of bed sheets than, say, the privatization of the physical therapy services rendered to the patients in that facility.

Those public services that are generally perceived, at least, to entail core governmental functions[38] tend to raise more pronounced accountability concerns when they are privatized.[39] So do governmental services that call for a degree of discretionary judgment by the service provider, which at times can involve policy-laden assessments.[40] Through privatization, decisions are placed

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[36] Van Horn, *supra* note 20, at 261, 277.

[37] *See* William T. Gormley, Jr., *Two Cheers for Privatization*, *in* PRIVATIZATION AND ITS ALTERNATIVES, *supra* note 15, at 307, 311.

[38] *See id.* As mentioned above, *see supra* note 27 and accompanying text, the far-flung extent of governmental functions today is not that easily or logically split into one pile of core/traditional activities and another of peripheral/nontraditional ones. Whether, for example, curbside refuse collection is regarded as a traditionally private or public function in a given jurisdiction depends in large part on local custom and history. Putting such harder classification problems aside, however, one must recognize that there are *some* governmental services in our country (*e.g.*, elementary education, police, prisons, libraries, seweage) that have been more frequently, if not universally or continuously, provided directly by public employees. When those particular services that are more often *thought* to be at the core of government get privatized, we tend to become more worried about such change and about having appropriate mechanisms of accountability in place.

[39] The effort by the Clinton Administration to privatize about 40% of the work of conducting security investigations of federal officeholders, for instance, met with major objections voiced by persons distrustful of delegating such a traditional governmental function to outside firms. It is feared that such private contractors will be more apt to misuse, misinterpret, or leak such sensitive private information than would federal agents in the career service. Those accountability concerns are accentuated by the problems uncovered in the White House's mishandling of FBI security files of high-level personnel from an outgoing Administration. *See* Stevenson, *supra* note 15, at A11 ("I truly believe that the type of work we do is inherently governmental. . . . There should be strict controls and strict access. It's not something that should have the profit motive behind it.") (quoting a federal investigator currently doing background checks); *see also* Stephen Gillers, *'Filegate' Was Bad Enough. Now This?*, N.Y. TIMES, July 5, 1996, at A23 (decrying privatization of federal security checks as an improper delegation of an inherently governmental function).

[40] For example, the principal of a public school may need to consider taking immediate disciplinary action to remove a teacher or student who appears to be posing a threat within the school building. That sort of on-the-spot judgment can implicate the principal's policy

in the hands of the private contractor with the delegated responsibility to make such "calls" unless the contract terms or rules of law prescribe a course of action. Delegating such authority over public functions to private actors can make folks nervous—at least in contexts where we have been previously accustomed to reposing day-to-day responsibility (and pinning blame when things go awry) on public officials.[41] We are used to complaining to the Mayor,

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preferences about issues such as discipline, safety, procedural fairness, and the like—which may or may not coincide with the policy preferences of the governing body or the community at large. When that principal is not a public employee, but rather works for a private contractor hired to manage the school, the linkage between the public's own policy preferences and those of the decisionmaker is more attenuated. Similar concerns arise in the management of other public institutions such as hospitals, jails, nursing homes, day care centers, and police forces, which likewise at times require the immediate exercise of discretion. In making this observation, I do not contend that public employees are necessarily responsive or attentive to public preferences, for many facets of government bureaucracies often skew and stymie the performance of public officials. *See infra* notes 53, 115 and accompanying text. The point here is simply that *the democratic process* is even less apt to influence the behavior of private workers hired through government contracts to fill those civil servants' shoes.

[41] Fueled by such concerns, a good deal has been written raising questions about the accountability of private firms to manage prisons, institutions which often are regarded as core governmental operations and ones that demand considerable on-the-spot discretion by the warden and her subordinates. *See, e.g.*, LOGAN, *supra* note 18 (detailing the many arguments that have been raised against privatizing prisons, but advocating that contracting out of prison operations should still be more frequently pursued); Nicole B. Casarez, *Furthering the Accountability Principle in Privatized Federal Corrections: The Need for Access to Private Prison Records*, 28 MICH. J. OF LAW REF. 249 (1995) (urging federal legislation to assure that records of privately-run federal prisons are publicly accessible as a means of promoting prison contractors' accountability); Warren I. Cikins, *Privatization of the American Prison System: An Idea Whose Time Has Come?*, 2 NOTRE DAME J.L. ETHICS & PUB. POL'Y 445 (1986) (advocating careful monitoring to deter corruption in private prisons); Michael Keating, Jr., *Public over Private: Monitoring the Performance of Privately Operated Prisons and Jails*, *in* PRIVATE PRISONS AND THE PUBLIC INTEREST 130 (Douglas C. McDonald ed., 1990); Ira P. Robbins, *The Legal Dimensions of Private Incarceration*, 38 AM. U. L. REV. 531, 539, 796 (1989) (observing at outset of article reporting on comprehensive ABA study of private prisons that "if this critical governmental function [(incarceration)] is to be contracted out, it must be accomplished with *total accountability*," and reiterating in conclusion that "to have any chance of succeeding in the long run, it [(prison privatization)] must be accomplished with *total accountability*"); Douglas W. Dunham, Note, *Inmates' Rights and the Privatization of Prisons*, 86 COLUM. L. REV. 1475 (1986) (arguing that thorough safeguards are needed to assure that government has effective control over private prison managers to assure adherence to constitutional principles); James T. Gentry, Note, *The Panopticon Revisited: The Problem of Monitoring Private Prisons*, 96 YALE L.J. 353 (1986) (proposing fines and other measures to enhance monitoring of privately managed prisons). *But*

the Governor, and even to the President when their underlings botch a public service; if those political leaders do not fix the problem to our collective satisfaction we can pillory them in the press and work to deny their re-election or quash their other political aspirations. Our political reflexes are much less developed in responding to foul-ups by private contractors hired to carry out work of the people.[42] In large measure, we tend instead to depend on government agencies to serve as our monitors over such contractors.

C. *Shortcomings of Governmental Oversight*

There are many reasons, however, to be wary of relying exclusively on government to oversee the private enterprises that it engages to perform public tasks. The procurement process itself is open to favoritism and corruption in the awarding of public contracts, which will occur at times in spite of stringently worded criminal statutes and regulations that prohibit such malconduct. Favoritism and corruption can also extend to the contract administration phase as well, when public officials responsible for overseeing the private vendor's work are bribed or otherwise persuaded to overlook the vendor's performance deficiencies.

Effective monitoring of contractors may be thwarted for more benign reasons. The government agency might not be appropriated sufficient funds by the legislative branch for auditors, inspectors, and investigators to police the agency's outside vendors.[43] Alternatively, the technical aspects of contract

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see Savas, Privatization and Prisons, *supra* note 17, at 899 (praising "expected innovations from a private prison industry and the introduction of competition as an antidote to government monopoly").

[42] This is not to suggest that private firms are indifferent to adverse publicity or angry citizens, or that the public lacks any means to exert control over such firms. The point here is simply that the conventional instruments of majoritarian control through the political process (*e.g.*, partisan campaigns, public petitions, referenda, political action committees, letters to the editor, pickets, leaflets and rallies, and so on) are better suited to influencing politicians than they are to influencing business enterprises. Private firms are more attuned to economic measures that directly affect their bottom lines than they are to political measures that only can affect them indirectly. For example, the managers of a private firm may not worry much about picketing outside of corporate headquarters that has no real effect on the firm's ability to do business, but should be quite concerned about organized consumer boycotts that lower the demand for its goods or services.

[43] This can be a substantial problem in the current political climate in which governmental downsizing is especially popular. In fact, a public agency stripped of adequate qualified staff may even need to resort to privatizing some or all of its own contract monitoring efforts, by hiring outside accountants, auditors, attorneys, and other private specialists with the expertise to review its other private contractors. Professor Prager, an economist, has concluded that the few studies that have examined government contract

administration may become so specialized that government will lack qualified in-house personnel to determine if a contractor is properly performing its job. Private contractors are apt to capitalize on these monitoring weaknesses by cutting corners in their assigned projects, using subpar materials, or skimping on labor. Moreover, when contract awards are contested by disappointed bidders, government often incurs litigation costs and other administrative burdens. Such disputes can siphon away public resources that could have been devoted to, among other things, the effective implementation and oversight of the contractors' work. The public, meanwhile, is disadvantaged, especially in situations where the outsourced function is suspended, scaled back, or otherwise restrained during the time that the procurement is tied up in court.[44]

Accountability also can suffer if the government becomes too dependent on a limited stable of private contractors. If the government has contracted with a single-source private entity to displace an entire public agency need or operation, that entity will have a monopoly for the government's business.[45] Such monopolies will cause the taxpayers to pay higher prices for that entity's ongoing services once government loses the functional capacity to retrieve those functions in house or to bid them out to a different contractor willing to make the necessary start-up investments to perform them. The private vendor itself, having an economic stake in continuing its business relationship with the public agency, may effectively lobby the legislative and executive branches to resist beneficial changes in government programs that might eliminate or reduce the need for that vendor's services.

Privatization also can hinder accountability where it reduces the noneconomic stake held by the persons actually responsible for providing the services to the public. This can arise in situations where privatization results in

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monitoring costs have been uninformative and have tended to underestimate such costs. *See* Prager, *supra* note 20, at 98–100. He further observes that some governmental agencies, particularly at the local level, merely oversee the financial terms of procurement contracts and do not monitor the actual product or service supplied by the vendors to assure compliance. *See id.* at 99–100 n.71.

[44] At times such bid disputes might produce offsetting benefits to the public if, for example, the litigation reveals that it was not in the public's best interests to have the contract awarded to the putative successful bidder. However, such litigation often tends to be more of a costly intramural fight between private competitors over obtaining a lucrative government contract than a process for optimizing public welfare.

[45] Defense contracting offers a classic example of such monopolistic tendencies, due to the economies of scale and organizational learning curves associated with producing specialized equipment for the military. *See* Marina Lao, *Mergers in a Declining Defense Industry: Should the Merger Guidelines Be Reassessed?*, 28 CONN. L. REV. 347, 385–89 (1996) (arguing that antitrust guidelines for mergers of defense firms should be revised to take into account these tendencies toward natural monopoly in military procurement).

the large-scale replacement of state or local government employees—many of whom will typically reside in or near communities they have served in their public jobs—with private workers that may come from disparate places.[46] Such newcomers may not share, at least immediately, the same concerns of longstanding residents about the particular public service that they are providing. If the work involved is portable (*e.g.*, "back-office" communications or data processing functions), the private vendor may have much of it physically done elsewhere by nonlocal workers. Managerial control might be wielded at a private vendor's out-of-state headquarters by executives having no special concern for the welfare of the community that hired their company. Moreover, out-of-state private bidders that have been awarded contracts on a transitory basis simply may not be attuned to local regulatory, legal, political, environmental, social, or cultural conditions that can affect the performance of their contractual duties.[47]

There are also constitutional limitations on the government's power over its contractors. Legislation or other government action that strips the private vendor of a bargained-for entitlement may run afoul of the Contract Clause of the United States Consitution.[48] Additionally, a contractor might contend that adverse governmental action has resulted in an unconstitutional taking of its property without just compensation or due process of law.[49] If the contractor

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[46] Not surprisingly, public employee unions have exerted pressure to stop privatization measures altogether, and failing that, to make the government contractually obligate the new private vendor to interview and rehire a number of the public employees that would otherwise be displaced by the privatized contract. *See* Howe, *supra* note 16, at 29; Moore, *supra* note 16, at C1. The retention of such local workers obviously tempers the intangible disadvantages of contracting out to a company with no previous ties to the community.

[47] Countervailing these disadvantages, of course, is the potential expertise gained by utilizing outside contractors selected from a wider market of service providers. At times, those outsiders will not be hemmed in by the same bureaucratic limitations and parochial conventions that can encumber local civil servants, and they may bring skills and resources not available locally. As the old saying goes, an "expert" might be defined simply as "somebody from out of town." *See, e.g.*, Reikes v. Martin, 471 So. 2d 385 (Miss. 1985); Mark Kadzielski et al., *Peer Review and Practice Guidelines Under Health Care Reform*, 16 WHITTIER L. REV. 157, 167 (1995); *Proceedings of the International Symposium on Law and Science at the Crossroads: Biomedical Technology, Ethics, Public Policy, and the Law: Defining the Limits of Organ and Tissue Research and Transplantation*, 27 SUFFOLK U. L. REV. 1457, 1457 (1993).

[48] *See* U.S. CONST. art. I, § 10; *see, e.g.*, United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977) (rendering void under the Contract Clause the retroactive repeal of a statutory covenant upon which private enterprise relied when contracting with state).

[49] *See* U.S. CONST. amends. V, XIV; *see also* Lynch v. United States, 292 U.S. 571 (1934) (invalidating under Due Process Clause repudiation by Congress of the terms of certain insurance contracts issued by United States during World War I); Bowen v. Public

has a long-term agreement that precludes the government from terminating the contract for its own convenience, such constitutional precepts may insulate the contractor from the prevailing winds of political change. Unless some breach of contract or out-and-out illegal conduct can be established, the public may well be stuck with a "bad deal" that government has made with a private vendor until that contract is completed or comes up for renewal or rebidding.[50]

It is not this Article's objective to settle the raging debate over the virtues or evils of privatization. That debate will go on, and should go on, as we continue

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Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 54–55 (1986) (acknowledging that congressional actions that breach outstanding federal contracts can amount to compensable takings under the Fifth Amendment, but finding no contractual duties had been created in the facts presented). During this past Term, the Supreme Court underscored, in *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996), the limits of Government in its role as a contracting party. In *Winstar*, the Court held that the Government did not have the unfettered sovereign power to rescind contractual promises it had made to investors who had purchased failing savings and loan institutions in the 1980s. Specifically, the Court found that the Government could not, through the passage of statutes changing the capital reserve requirements for thrift institutions, deprive thrift purchasers of beneficial accounting treatment that the Government earlier had promised them at the time of the thrift acquisitions. *See id.* at 2442–46. A majority of the Justices in *Winstar* were unpersuaded by the Government's arguments that subsequent regulatory changes were insulated from liability under traditional legal doctrines protecting the Government's "sovereign acts" and requiring "unmistakability" in contract language claimed to waive the sovereign's power to enact future legislation. The Court rejected those defenses in spite of the general welfare that would have been advanced, in the context of the national savings and loan crisis, by the subsequent legislation. *See id.* at 2461, 2463–71.

[50] Harold Krent has highlighted the antimajoritarian dangers of allowing legislators and executives to enter into long-term government contracts that bargain away the sovereignty and policy choices of future administrations. *See* Harold J. Krent, *Reconceptualizing Sovereign Immunity*, 45 VAND. L. REV. 1529, 1560–64 (1992). The Supreme Court's narrowing of the sovereign acts and unmistakability doctrines in *Winstar*, described *supra* note 49, will make it more difficult for Government to extract itself from such agreements. Chief Justice Rehnquist, joined by Justice Ginsburg in dissent in *Winstar*, expressed fears that the plurality's opinion "works sweeping changes in . . . the law dealing with Government contracts" in a manner that overlooks "the necessity of protecting the federal fisc—and the taxpayers who foot the bills—from possible improvidence on the part of the countless Government officials who must be authorized to enter into contracts for the Government." *Winstar*, 116 S. Ct. at 2479, 2485 (Rehnquist, C.J., dissenting). Whether or not *Winstar* was correctly decided, its effect will be to reduce the control that government can properly exert over its contractors. As argued herein, private litigation can play a useful role in filling in the gaps of governmental oversight.

to experience[51] or retreat from[52] privatization in actual practice. But whether one favors or disfavors such contracting out in principle, few would quarrel[53] with the notion that accountability is a sine qua non to the successful privatization of any public function in practice. As explained above, that essential feature includes accountability to the public agency that engages the outside firm, to the citizens that use or rely on that privatized service, and in an ultimate sense, to the electorate at large.

For reasons explored more fully below, rules of law can provide an important tool in promoting the accountability of government contractors. As a threshold to such analysis, it is first useful to delve into the liability precepts that apply to the government itself when it causes injuries to others. A cornerstone of those principles is the historic doctrine of sovereign immunity, a doctrine that in spite of its criticisms has proven to be remarkably durable and one that has even been legislatively and judicially extended at times in the modern era to cover certain activities by government contractors.

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[51] See the privatization trends and developments described *supra* notes 14–30 and accompanying text.

[52] In the past year, for example, both Baltimore, Maryland, and Hartford, Connecticut prematurely ended their respective five-year contracts with a private firm to manage some or all of their city schools after budgetary and contract performance issues arose that made completion of the contracts undesirable. *See* GAO/HEHS-96-3, *supra* note 19, at 3; *see also* Elissa Silverman, *Learning Curve*, THE NEW REPUBLIC, Jan. 29, 1996, at 10–11. *But see* Peter Applebome, *Grading For-Profit Schools: So Far, So Good*, N.Y. TIMES, June 26, 1996, at A1 (reporting successes of privatized public schools operated in Boston, Massachusetts, Wichita, Kansas, Mount Clemens, Michigan, and Sherman, Texas by a different contractor from the one utilized in Baltimore and Hartford).

[53] It has been argued that the accountability to the voting public of *government agencies* is not all that important. *See* Abner S. Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123, 177–79 (1994) (contending that the absence of direct electoral accountability of independent federal administrative agencies is "comparatively irrelevant" to the offsetting advantages of insulating such agencies from hegemonic control by the President or Congress). Nevertheless, Greene acknowledges that even nominally "independent" agencies are not "truly free-floating." *Id.* at 179. Such agencies still are accountable to the President because of his role in the appointment and reappointment of agency heads, the agencies' reliance upon the White House and the Office of Management and Budget for support in budgetary negotiations with Congress, and their dependence on the Department of Justice in legal matters. Likewise, such agencies are also dependent upon Congress with regard to their annual budgets as well as for maintaining their delegated statutory authority. *See id.* Greene's above-cited article also does not reach the question posed herein, *i.e.*, the accountability of *private* contractors hired by administrative agencies.

II. IMMUNITY AND LIABILITY CONCEPTS AS APPLIED TO GOVERNMENT AND TO GOVERNMENT CONTRACTORS

Countless persons who either have sued or considered suing the government over an injury resulting from a public function have confronted the axiom that "the king can do no wrong."[54] The principle of sovereign immunity, a vestige of the English common law, has remained largely embedded in American jurisprudence[55] despite modern statutes and case law that have reduced its contours.[56] While the federal government[57] and many

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[54] The doctrine does not signify that a King is incapable of wrongdoing, but rather that a King would not have wanted a wrong to be committed in his name. *See* WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 78 (William Browne, ed., 1897) ("The King can do nothing wrong. This means, that whatever is exceptionable in the conduct of public affairs, is not to be imputed to the King, nor is he answerable for it personally to the people."); *see also Ex Parte* Young, 209 U.S. 123, 159 (1908) (holding that a federal court may enjoin a state official, if not state government, from engaging in federal constitutional violations, under the legal fiction that the wrongdoing state official is not carrying out the will of the sovereign state).

[55] In 1821, the United States Supreme Court first held, in an opinion by Chief Justice Marshall, that the United States could not be sued without its consent. *See* Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411–12 (1821). Later opinions reaffirmed the government's immunity. *See, e.g.*, United States v. Lee, 106 U.S. 196, 207 (1882) (characterizing federal sovereign immunity as "an established doctrine"); Hill v. United States, 50 U.S. (9 How.) 385 (1850) (sustaining immunity defense); United States v. McLemore, 45 U.S. (4 How.) 286 (1846) (sustaining immunity); *see also* THE FEDERALIST NO. 81 (Alexander Hamilton) (asserting that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent"). For a detailed tracing of the origins of sovereign immunity principles in American law, see Rodolphe J.A. de Seite, *The King Is Dead, Long Live the King! The Court-Created American Concept of Immunity: The Negation of Equality and Accountability Under Law*, 24 HOFSTRA L. REV. 981, 989–1020 (1996).

[56] *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON, ON THE LAW OF TORTS §§ 131–32 (5th ed. 1984).

[57] Pursuant to the Tucker Act, first passed by Congress in 1887, nontort monetary claims may be brought against the United States in what is now the Court of Federal Claims. *See* 28 U.S.C. §§ 1346(a), 1491(a)(1) (1994). Since the passage in 1946 of the Federal Tort Claims Act, Congress has also waived much of the federal government's sovereign immunity from tort liability, allowing tort actions (subject to various exceptions and limitations) to be brought against the United States in the federal district courts. *See* 28 U.S.C. §§ 1346(b), 1402, 2401–02, 2412, 2671–80 (1994). A 1976 Act of Congress also waived, again subject to certain restrictions, the sovereign immunity of the United States from suits in the federal district courts seeking injunctive or other nonmonetary relief. *See* 5 U.S.C. § 702 (1994). Government contractors specifically can bring actions against the United States in the Court of Federal Claims pursuant to the Contract Disputes Act of 1978. *See* 28 U.S.C. § 1491(a)(2)

states[58] have repealed or waived the sovereign's historical immunity from suit in a variety of contexts, the doctrine persists today through a host of codified or judge-made exceptions that continue to immunize certain defined categories of governmental action or inaction from civil redress.[59] In addition to having those liability protections, public entities are often shielded from various remedial measures normally available in purely private litigation, such as prejudgment interest,[60] certain kinds of injunctions (*e.g.*, those that would usurp legislative appropriation processes unconstitutionally or would otherwise infringe too far

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(1994). There are also other miscellaneous federal laws waiving portions of the United States' sovereign immunity. *See generally* STEADMAN ET AL., LITIGATION WITH THE FEDERAL GOVERNMENT (3d ed. 1994) (discussing various federal laws waiving the sovereign immunity); 14 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 3656 (1985 & Supp. 1995) (same).

[58] *See* KEETON ET AL., *supra* note 56, § 131, at 1045 (noting that about thirty states have abrogated sovereign immunity in a "substantial or general way," and that all but one or two of the rest have altered their laws to authorize civil recoveries against the state in court or administrative proceedings).

[59] For example, the Federal Tort Claims Act (FTCA) contains major exceptions that immunize the government from tort liability for conduct involving discretionary functions, *see* 28 U.S.C. § 2680(a) (1994); the execution with due care of federal statutes or regulations that are later found invalid, *see id.*; and various intentional torts including assaults, batteries, false arrests, false imprisonments, malicious prosecutions, abuses of process, deceit, libel, slander, or interference with contract rights, *see id.* § 2680(h). The Supreme Court has also construed the FTCA's waiver of sovereign immunity inapplicable to injuries by military personnel arising out of their service-related activities, thereby shielding the United States from such suits under what is known as the "*Feres* doctrine." *See* Feres v. United States, 340 U.S. 135, 146 (1950); *see also infra* note 66 and accompanying text. State and local governments also are widely protected by a host of diverse statutory and common law immunities, ranging from such things as immunity for the plan and design of public highways, *see, e.g.*, Weiss v. Fote, 167 N.E.2d 63 (N.Y. 1960), to immunity for harm caused by escaped prisoners, *see, e.g.*, N.J. STAT. ANN. § 59:5-2(b) (West 1992), to immunity from injuries on unimproved public lands, *see* CAL. GOV'T CODE §§ 831.2, 831.4, 831.6 (West 1995).

[60] *See, e.g.*, 28 U.S.C. § 2516 (1994) (disallowing interest on judgments entered against United States in the Court of Federal Claims); *id.* § 2674 (barring prejudgment interest in actions under FTCA).

upon principles of comity or separation of powers),[61] and, as detailed in Part III below,[62] punitive or exemplary damages.

A. *Substantive and Fiscal Rationales for Immunity*

The public policies underlying these enduring governmental immunities under federal and state law can be divided into two categories. First, there are what may be called "substantive" reasons for the governmental immunity or limitation on liability. These substantive reasons involve a policy determination that certain forms of governmental conduct—whether they be active or passive—should be placed beyond the reach of civil suits because the public will benefit if such conduct cannot be second guessed in a courtroom. Precedents that confer, for instance, absolute immunity upon the judiciary[63] for harms arising out of in-court proceedings, or laws that provide discretionary immunity for high level executive branch policy choices,[64] have substantive rationales stemming from the inherent nature of those governmental activities. As a substantive matter, the administration of justice likely would suffer if disgruntled litigants (or other persons unhappy with case outcomes or the language of judicial opinions) could readily vent their displeasure through subsequent damage actions against the judiciary or court personnel. Likewise, it arguably would be dysfunctional if the government were liable in tort every time elected leaders or their designees, in exercising their policy prerogatives in a good faith manner to achieve benefits for the public at large, caused some harm to narrow private interests. Indeed, political decisions often necessarily involve distributional impacts and societal tradeoffs that easily could instigate lawsuits by the "losers" in those allocations. Accordingly, the law has

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[61] *See, e.g.*, Missouri v. Jenkins, 495 U.S. 33 (1990) (vacating, as contrary to federal-state comity principles, federal district court order requiring a school district to increase realty taxes to fund school desegregation plan); Edelman v. Jordan, 415 U.S. 651 (1974) (holding states immune under Eleventh Amendment from federal injunctions to compel payment of state funds); Camden v. Byrne, 411 A.2d 462 (N.J. 1980) (holding that judiciary ordinarily may not compel the Legislature to make specific appropriation nor order the Governor to recommend or approve such appropriation).

[62] *See infra* notes 89–135 and accompanying text.

[63] *See, e.g.*, Pierson v. Ray, 386 U.S. 547 (1967) (sustaining doctrine of judicial immunity even where bad faith alleged). *See generally* J. Randolph Block, Stump v. Sparkman *and the History of Judicial Immunity*, 1980 DUKE L.J. 879 (1980) (discussing the history and present state of the doctrine of judicial immunity).

[64] *See, e.g.*, 28 U.S.C. § 2680(a) (1994) (providing immunity for discretionary decisions by federal officials); Harlow v. Fitzgerald, 457 U.S. 800 (1982) (recognizing qualified immunity of certain state officers for good faith infringement of other's constitutional rights).

fashioned these and other substantive[65] immunities to avoid unduly chilling judges, presidents, governors, agency heads, and other governmental actors. Absent protection from civil liability, governmental leaders might be more inclined to shy away from performing their duties, at least in circumstances where their decisions are bound to disadvantage or dissatisfy some segment of the populace.

To some extent, what is described here as the substantive rationale of sovereign immunity also advances constitutional norms of separation of powers. Preserving immunity means that a range of executive and legislative decisions may not be routinely challenged in the judicial branch through private suits seeking monetary damages. This does not amount, however, to the airtight insulation of executive or legislative decisionmaking. The performance of those branches of government may still be subject to judicial review in other ways, such as through appeals of administrative agency determinations, or through lawsuits that attack the constitutional validity of statutes, regulations, or other forms of state action. Nonetheless, a legal system with those alternative routes of review is surely not as intrusive on executive and legislative prerogatives as a system that would *also* allow every perceived wrong committed by the executive or the legislature to be fodder for a common law tort action.

Perhaps recognizing their institutional self-interest in maintaining a degree of freedom from court review, legislatures and governors have chosen to reinstate by statute numerous facets of sovereign immunity even in those states where the doctrine has been formally abrogated. In reviving those specific immunities, lawmakers are often advancing substantive policies about the

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[65] I would also sweep in this notion of substantive immunities the nonfiscal aspects of the special procedures that typically apply to suits against public entities, *e.g.*, presuit notice requirements for governmental tort claims or doctrines requiring plaintiffs suing the government to exhaust administrative remedies. *See* 28 U.S.C. § 2401(b) (1994) (requiring claimants to provide written notice to the allegedly responsible agency within two years of the accrual of the claim and barring suit for six months thereafter); N.J. STAT. ANN. § 59:8-8 (West 1992) (requiring 90 days notice to the public entity). Although such measures do regulate procedure, they are founded upon substantive justifications tied to public policy objectives. In particular, presuit tort notice requirements afford public entities charged with tortious conduct greater time to investigate and to attempt to resolve such claims informally before they are burdened by the rigors of litigation. Likewise, principles of administrative exhaustion at times channel disputes from courts to regulatory agencies for the substantive purpose of taking advantage of the agencies' presumed expertise over the technical subject matter involved. *See, e.g.*, Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50–51 (1938) (requiring exhaustion of administrative agency remedies). These prerequisites also have fiscal ramifications, in discouraging or delaying suits that could result in large financial exposures for the government. Nevertheless, the dollar impacts of such rules may be separated from their distinct substantive features.

structure and operation of government itself. These substantive aims may be distinguished from purely budgetary concerns about governmental liability that are described below.

A second objective of sovereign immunity arises out of what can be regarded as "fiscal" concerns. Immunities may be substantially predicated on protecting the public treasury, and thereby the taxpayers at large, from what could be enormous monetary liabilities if government were held legally accountable in civil litigation in exactly the same fashion as private entities and persons. For example, there are immunities that insulate government from tort liability to soldiers killed or wounded in combat,[66] as well as state-law tort immunities that can protect government from failing to provide adequate police protection or enough signs at traffic intersections.[67] These fiscal protections grow out of the stark reality that government, in spite of its pervasiveness in our society, simply cannot do or afford to do everything that it should do. Assuming that the government could muster the resources to pay huge civil judgments produced under ordinary rules of civil liability, such enormous liabilities could skew the overall use of taxpayer dollars by diverting funds from other programs or services that the citizens would regard as more vital. To avoid fiscal calamity, a body of law remains to protect government treasuries from colossal tort or other civil liabilities, even if one might think that there is no compelling substantive reason justifying that insulation.[68]

For these assorted substantive and fiscal reasons, the doctrine of sovereign immunity lingers today, here and there in case law and statutes.[69] Accordingly,

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[66] *See* Feres v. United States, 340 U.S. 135, 142–43 (1950); *see also supra* note 59. The *Feres* doctrine also is founded on substantive policies to maintain the integrity of military structure. *See Feres*, 340 U.S. at 141–42. Even if one regards that substantive rationale of *Feres* as unpersuasive, there can be little doubt that the potential fiscal impact of tort actions by wounded soldiers or their estates against the United States could be enormous, especially in times of war or other military conflicts.

[67] *See, e.g.*, N.J. STAT. ANN. § 59:4-5 (West 1992) (immunizing failure to provide sufficient ordinary traffic signs); Massengill v. Yuma County, 456 P.2d 376 (Ariz. 1969) (immunizing from private suits the government's failure to provide adequate police protection).

[68] Of course, there are many governmental immunities that are conceptually supported by both substantive and fiscal rationales. Absolute immunity for the judiciary, for example, might be defended as a fiscal matter as well as a substantive matter, given the thousands of cases disposed of by the courts daily and the fact that virtually every court decision involves at least one unhappy loser.

[69] Even where a statute is passed that seems to specify standards for governmental behavior, the Supreme Court has required that a waiver of the government's sovereign immunity from liability when it runs afoul of those standards be "clearly" expressed in the statute. *See* Lane v. Pena, 116 S. Ct. 2092, 2100 (1996) (concluding that Congress did not

public entities are often not treated like private defendants when they are sued in tort, for breaches of contract, or upon other legal theories of recovery. A patchwork of immunities covers much of government at all levels, making it hard to sue and even harder to beat in court. This at times surely leads to inequitable outcomes in individual cases. The tradeoff is that government agencies can go on with the public's work most of the time without undue judicial interference or without being hampered by fears of whopping civil exposures.[70] Those government agencies still must be ultimately accountable for their performance, even in those situations where they are immune from civil liability, through the democratic process.

Undoubtedly, electoral oversight is a rather crude instrument. Its effectiveness is reduced by the flaws of the modern political campaign process in accurately reflecting popular sentiment, as well as by the degree of autonomy that may be statutorily delegated to any particular governmental agency. Yet, in

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clearly waive federal government's sovereign immunity against monetary damages in actions brought against United States under the Rehabilitation Act of 1973); *see also* United States v. Nordic Village, 503 U.S. 30, 33–34, 37 (1992) (holding that United States did not clearly waive its sovereign immunity from monetary damages under section 106(c) of the Bankruptcy Code). This rule of statutory interpretation, which has the effect of preserving sovereign immunity in instances of legislative ambiguity or silence, has been criticized as contrary to the principle of legislative supremacy. *See* John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771, 776 (arguing that clear-statement approach should give way to conventional rules of statutory construction in deciding whether Congress intended to waive sovereign immunity in a particular statute).

[70] Many scholars in recent years have criticized sovereign immunity as, among other things, antidemocratic and anachronistic. *See, e.g.*, Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1473–81 (1987) (arguing that sovereign immunity should not be a defense to constitutional violations by governmental actors); *see also* Roger C. Crampton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 MICH L. REV. 387, 419 (1970) (observing that no scholar "has had a good word for sovereign immunity for many years"); William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1093 (1989) (characterizing sovereign immunity as an obsolescent doctrine that should be "rethought for this era when the government is our nation's leading contractor and tortfeasor and property owner"). *But see* Krent, *supra* note 50, at 1529–31 (defending sovereign immunity as means to promote constitutional separation of powers because it abates pressures on Congress and the President to conform to judicial policy values). My intention here is neither to praise sovereign immunity in general nor to bury it. For context, I simply am recounting the premises that lie beneath our current system of limited governmental liability. Given that extant system and its premises, this Article simply aims to show that one facet of it—the sovereign's traditional immunity from punitive damages liability—should *not be broadened* to cover government contractors. Surely even the severest critics of sovereign immunity would concur with such an argument against extending the doctrine any further.

the long run, each agency must depend on the fiscal and political support of the public at large for its survival. Without such continuing support, the agency can be defunded or even legislated out of existence. The upshot is that public entities may be somewhat freed from civil liability in the courthouse, but they remain tethered to popular will in every voting booth. Although that electoral "leash" may not be as tight as it should be, it remains a defining characteristic of our representative democracy.

B. *Extensions of Governmental Immunities to Contractors*

What becomes of these various principles of sovereign immunity when the government has contracted out some of its functions to private entities? General sovereign immunity statutes typically confine their protections to public entities and exclude private contractors from their literal scope.[71] Moreover, quasi-

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[71] The FTCA specifically excludes private contractors with the United States from the scope of its coverage. *See* 28 U.S.C. § 2671 (1994). In addition, more than half of the states have tort claim statutes that expressly carve out independent contractors from the definition of public employees protected by the statutory immunities. *See* ARIZ. REV. STAT. § 12-820(1) (1992) (excluding independent contractors from the definition of immunized public employees); CAL. GOV'T CODE § 810.2 (1995) (same); COLO. REV. STAT. § 24-10-103(4)(a) (West Supp. 1996) (same); GA. CODE ANN. § 50-21-22(7) (1989) (same); HAW. REV. STAT. ANN. § 662-1 (Michie 1995) (same); IDAHO CODE § 6-902(4) (1990 & Supp. 1996) (same); 745 ILL. COMP. STAT. 10/1-202 (West 1993) (same); IND. CODE ANN. § 34-4-16.5-2(b)(1) (1986 & Supp. 1996) (same); IOWA CODE ANN. § 669.2(4) (West Supp. 1996); KAN. STAT. ANN. § 75-6102(d) (1989 & Supp. 1995) (same); KY. REV. STAT. ANN. § 65.200(2) (1994) (same); MINN. STAT. ANN. § 466.01(6) (1994 & Supp. 1997) (same); MONT. CODE ANN. § 2-9-101(2) (1995) (same); NEB. REV. STAT. ANN. § 81-8,210(1)-(3) (1994) (same); N.J. STAT. ANN. § 59:1-3 (West 1992 & Supp. 1996) (same); N.Y. PUB. OFF. LAW § 17(1)(a) (1988 & Supp. 1997) (same); N.C. GEN. STAT. § 143-300.2(2) (1996) (same); N.D. CENT. CODE § 32-12.1-02(3) (1996) (same); OHIO REV. CODE ANN. § 2744.01(B) (Anderson 1992 & Supp. 1995) (same); OKLA. STAT. ANN. tit. 51, § 152(5)(a)(1) (West 1988 & Supp. 1997) (same); 42 PA. CONS. STAT. ANN. § 8501 (West 1982) (same); S.C. CODE ANN. § 15-78-30(c) (Law Co-op. Supp. 1996) (same); S.D. CODIFIED LAWS § 3-21-1(1) (Michie 1994) (same); TENN. CODE ANN. § 29-20-107 (1988 & Supp. 1996) (same); TEX. CIV. PRAC. & REM. CODE ANN. § 101.001(1) (1986) (same); UTAH CODE ANN. § 63-30-2(2) (1993 & Supp. 1996) (same); W. VA. CODE § 29-12A-3(a) (1992) (same); WYO. STAT. ANN. § 1-39-103(a)(iv)(B) (Michie Supp. 1996) (same); *see also* KY. REV. STAT. ANN. § 44.073(15) (1993) (declaring the Commonwealth not liable for acts of its independent contractors). As a variation, New Mexico specifies that some limited categories of independent contractors are within the scope of its governmental tort claims laws. *See* N.M. STAT. ANN. § 41-4-3(F)(7), (8), (10), (14) (1996) (covering private physicians, dentists, and psychologists under contract at state prisons or in state-sponsored programs for children, youth, and families; private directors of state health insurance pool board; and private persons in court-appointed special

public entities that are defined in their enabling legislation as "sue-and-be-sued" agencies sometimes do not enjoy the full range of immunities and limitations on liability that blanket the principal departments of federal or state government.[72] Nevertheless, courts at times have derivatively extended the principles of governmental immunity on a selective basis to private persons or entities acting at the behest of a governmental authority.[73] A few statutes also provide limited immunities to government contractors in specific contexts.[74]

One prominent illustration of such derivatively shared sovereign immunity is the so-called "government contractor" defense in the law of products liability. This defense has been fashioned to protect private suppliers to federal, state, and local agencies from liability to third parties injured by their products when various criteria are met that, in essence, show that the supplier was faithfully adhering to product specifications mandated by their governmental

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advocate programs). By contrast, Maine vests its public entities with discretion to defend and to indemnify out of public funds, private service providers and landlords that have been sued in tort actions arising out of their respective contracts with the government. *See* ME. REV. STAT. ANN. tit. 14, § 8112(7) (West 1980).

[72] *See, e.g.*, 28 U.S.C. § 2680(*l*)-(n) (1994) (excluding tort claims against Tennessee Valley Authority, Panama Canal Co., federal land banks, intermediate credit banks, and other specified federal "sue-and-be-sued" agencies from scope of FTCA); Bell v. Bell, 416 A.2d 829, 832-33 (N.J. 1980) (holding the Delaware River Port Authority, established as sue-and-be-sued bi-state agency by an act of Congress, to be outside of the immunity protections of New Jersey Tort Claims Act).

[73] *See generally* A.E. Korpela, Annotation, *Right of Contractor with Federal, State or Local Public Body to Latter's Immunity from Tort Liability*, 9 A.L.R.3d 382 (1966 & Supp. 1996) (surveying state cases and laws extending such immunity to contractors). Contractors on occasion also will assert, as a defense in private litigation, that they are "enveloped in the cloak of the government's sovereign immunity" by virtue of indemnity obligations that the government contractually owes to them. *See* MCBRIDE, *supra* note 9, § 3.10[7]. The courts have been split on whether a private contractor sued under 42 U.S.C. § 1983 for violating federal rights under color of state law can invoke a "qualified immunity" defense like that held by state officials in circumstances where the official acted in good faith. *Compare* Warner v. Grand County, 57 F.3d 962, 965-66 (10th Cir. 1995) (granting qualified immunity to a crisis center director conducting strip search at the request of police officer) *with* McKnight v. Rees, 88 F.3d 417, 424-25 (6th Cir. 1996) (denying qualified immunity to private prison operator). The United States Supreme Court has granted certiorari in *McKnight* to settle this question. *See* Richardson v. McKnight, 117 S. Ct. 504 (1996).

[74] *See, e.g.*, 28 U.S.C. § 1498 (1994) (immunizing private contractors on federal projects from liability for patent infringement); Richmond Screw Anchor Co. v. United States, 275 U.S. 331, 339 (1928) (applying § 1498); TVI Energy Corp. v. Blane, 806 F.2d 1057, 1060 (Fed. Cir. 1986) (construing § 1498 immunity to extend to private parties bidding on contracts with United States whether or not bidder is successful); *see also* Price-Anderson Act, 42 U.S.C. §§ 2210-12 (1994) (conferring various limitations on third-party civil liability of private entities contracted by United States to operate nuclear facilities).

customers. In 1988, the Supreme Court in *Boyle v. United Technologies Corp.*[75] crafted such a federal immunity that can displace government contractors' potential liability to third parties under state law for design defects in military equipment. The immunity applies in circumstances where "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States."[76]

The Court's majority opinion in *Boyle* recognized that the United States government itself is generally immune from design-defect liability under the discretionary function exception[77] to the Federal Tort Claims Act (FTCA).[78] Given the policy decision of Congress to create such an immunity for the government, the Court concluded that private contractors hired by the government should at times derivatively share that immunity for those same policy reasons. Those policy reasons involve what I have classified above as substantive and fiscal concerns. As to the former, the government contractor defense helps assure that private civil actions cannot be used to "second-guess" and thereby undermine the government's necessary discretion in choosing military hardware.[79] In addition, extending this sort of immunity to military contractors prevents the financial burdens of civil judgments against such contractors from being "passed through, substantially if not totally, to the United States itself" in the form of higher prices.[80] States have likewise recognized similar immunities to shield private contractors that serve government agencies.[81]

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[75] 487 U.S. 500 (1988).

[76] *Id.* at 512.

[77] *See* 28 U.S.C. § 2680(a) (1994).

[78] *See Boyle*, 487 U.S. at 511. The Court observed that

> the selection of the appropriate design for military equipment to be used by our Armed Forces is assuredly a discretionary function within the meaning of [section 2680(a)]. It often involves not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness.

Id.

[79] *See id.*

[80] *Id.* at 511–12.

[81] *See* Korpela, *supra* note 73 and state court cases cited therein; *see also* Cobb v. Waddington, 380 A.2d 1145, 1148–49 (N.J. Super. Ct. App. Div. 1977) (holding road contractor that had installed barricades that were struck by plaintiff motorist was entitled to share public entity's statutory immunity for planning and designing highways, where the

When its criteria are met, the government contractor defense espoused in *Boyle* and in similar cases will result in treating the private contractor and the government itself identically with respect to third-party liability. The premise of *Boyle* is that when a private actor steps into the government's shoes, the actor can take on some of the perquisites of sovereignty. If in certain contexts the sovereign can "do no wrong" in the eyes of the law, then one might suppose that neither can a private agent that is merely carrying out the sovereign's will in those same contexts. By such reasoning, the substantive and fiscal reasons that warrant immunizing government for certain conduct arguably should likewise extend down the chain of delegated public functions. *Boyle* thus envisions that accountability is achieved through the public's democratic control over elected officials who, in turn, can exert control over government contractors by holding them to the letter of strictly drafted contract terms.

Dean Cass and Professor Gillette have rightly criticized the reasoning of *Boyle* as oversimplified.[82] They have pointed out that the utility of *Boyle*'s government contractor defense largely depends on how one views the efficacy of the public officials who administer those contracts. Advocates of government contractor immunity optimistically assume, at least implicitly, that public officials are "motivated by the public good and usually are able to secure it without judicial intervention."[83] Under this view, applying routine tort principles and other civil liability rules to make government contractors accountable to the public at large may be "superfluous at best and pernicious at worst."[84] Conversely, opponents of contractor immunity pessimistically regard government procurement officers as bureaucrats who are often influenced by goals other than the public's best interests and who thus are "unwilling or unable" to structure and monitor contracts in a manner that maximizes the public welfare.[85] From this competing perspective, "the threat of judicial

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public entity had specified for the contractor the types and locations of the barricades). *Accord* Miller v. United Tech. Corp., 660 A.2d 810, 819 (Conn. 1995) (applying *Boyle* government contractor defense to facts involving military equipment purchased by United States from private contractor for resale to a foreign government); Feldman v. Kohler Co., 918 S.W.2d 615, 627–30 (Tex. Ct. App. 1996) (affirming summary judgment based on *Boyle* immunity, dismissing claim against a government contractor, but remanding as to other claims for which triable issues of fact existed).

[82] *See* Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257, 261–69 (1991).

[83] *See id.* at 260. Cass and Gillette describe this as the "Perfect Government Model." *See id.* at 261.

[84] *See id.*

[85] *Id.* Cass and Gillette identify at least four other concerns that can replace social good in motivating governmental actors: the maximization of their own agency budgets ("budget maximization"), *see id.* at 321–25; the uncompromising advancement of the agency's

oversight and imposition of liability is essential to induce contractors to behave in a manner that coincides with the public interest."[86]

Taking neither the absolutist course of optimism or pessimism, Cass and Gillette propose that *Boyle* should be refined to apply immunity and liability principles to government contractors in a more selective manner. They suggest that when choosing between rules of contractor immunity or contractor liability, we should look at the context of the governmental activity involved and then tailor the rules accordingly.[87] They argue that this contextual approach is preferable to adopting categorical immunity/liability rules for government contractors founded either on a "perfect government" model (which assumes that agencies will capably oversee those outside contractors in the public's best interests) or on an equally rigid "interested actors" model (which distrusts the capacity or willingness of allegedly self-serving public officials to police such contractors).

As argued by Cass and Gillette with specific reference to the *Boyle* government contractor defense, we ought to be selective *in general* in extending sovereign immunity principles to private actors hired to undertake the people's work. Courts and legislatures should not confer the immunities that protect

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program goals even where it is not optimal to do so given the presence of other competing public goals or concerns outside of the agency's mission ("program advancement"), *see id.* at 325–27; the desire to serve the special interests of the agency's "clients," such as political leaders that support the agency or the industries that it may regulate ("client service"), *see id.* at 327–33; or the personal desires or professional career interests of agency decisionmakers ("personal advancement"), *see id.* at 333–35. Cass and Gillette label this alternative model of governmental behavior as the "Interested Actors Model." *See id.* at 262.

[86] *Id.* at 261.

[87] *See id.* at 307. Specifically, Cass and Gillette argue for the following elaborate set of default principles: (1) normal tort liability rules should apply when government is purchasing standard, "off-the-rack" products from private suppliers; (2) normal tort rules should also apply when government contracts to purchase consumer goods with public good features, leaving open the possibility that the government may choose to indemnify such contractors if it deems it necessary to attract sufficient suppliers of such goods when they can involve large liability risks; (3) neither normal tort rules nor immunity rules are presumptively appropriate for basic contracts involving specialized goods produced exclusively for the government, as the selection of the proper rule should turn on the capacity of the contractor to exploit its near-monopoly over the government; (4) immunity rules are preferable in "repeat-play" and "phased-delivery" situations where private vendors supply specialty goods on a phased basis that increases the leverage over them by government officers monitoring those contracts; (5) no presumptive rule of liability or immunity ideally applies to "latency" situations where the defect in the contractor's product will not materialize for a substantial time after its manufacture; and (6) immunity rules should apply to contractors supplying goods with unique military features, at least where government employees comprise the likely class of those who risk injury from those products. *See id.* at 307–18.

public entities in toto to every vendor who does business with the government. After all, the very privatization of the function supposes that the vendor can do a better job than the government can. That perceived comparative edge may stem from the private contractor's flexibility to perform the function without some of the operational constraints of government itself, such as internal agency protocols, civil service regulations, public employee union rules, procurement processes, dependency on centralized support services, and other red tape. Given those apparent advantages, it seems unnecessary to insulate the private vendor from liability to the fullest extent that the law insulates government itself. Since the contractor is already used to facing liability exposure under ordinary rules of law while it is engaged in its private work, there is little reason to give it special protection in every instance when it happens to be on "government time." If immunity were the rule and not the exception for such contractors, their wrongful behavior might be underdeterred and victims of their wrongful acts might be undercompensated.

Conversely, there are circumstances where it may be sensible, for substantive and/or fiscal reasons, to provide government contractors with a degree of protection from third-party liabilities when they are acting within the scope of their assigned public functions. For instance, government may not be able to obtain some especially hazardous products or services (*e.g.*, nuclear power or lethal military weapons) either at all or at acceptable prices unless it offers private vendors some limitation on their potential liability for providing it. There also can be situations when we do not want private vendors discouraged from bidding on government work out of fear that they will be unduly burdened by litigation niggling about their performance. Blanket immunity, however, is not needed to accomplish this. As Cass and Gillette demonstrate, *Boyle* in certain respects went too far in seeking ways to protect government contractors that do not always need such liability protection.

Taking into account these considerations, the presumptive rule of law for government contractors should be a principle of conventional liability rather than immunity. Such a presumption best promotes the aforementioned vital public objective of accountability. It should be overcome only in contexts where it is demonstrable that holding government contractors accountable to third parties under ordinary rules of civil liability would disserve even more vital substantive or fiscal concerns.

If one thus accepts the view that the sovereign immunity principles that shield public entities from certain *liabilities* should not be indiscriminately extended to government contractors, it is not a far leap to posit further that doctrines limiting or precluding private recovery of certain kinds of *damages* against the government also should not be categorically extended. The damages side of the equation should be approached no less selectively than the liability side. Here again, to foster contractor accountability, the starting presumption

should be to apply the ordinary law of damages to government contractors found liable to third parties they injured in the course of their work. We should cautiously depart from that presumption (and thereby extend to government contractors the special rules that limit or preclude certain damages against public entities) only where doing so will achieve other countervailing public interests that outweigh the need to maximize the contractor's accountability.

As noted above, one of those "special" principles that traditionally protect the sovereign in the realm of damages is the notion that punitive damages usually are not recoverable from public entities.[88] The next section examines the accountability notions that underlie punitive recovery in general and why public entities typically have been deemed immune from such damages.

III. PUNITIVE DAMAGES AS AN ACCOUNTABILITY DEVICE AND WHY PUBLIC ENTITIES ARE GENERALLY IMMUNE FROM THEM

A. *Punitive Damages: Standards and Purposes*

Punitive (or "exemplary") damages are sums assessed in civil litigation against a wrongdoer over and above the compensatory damages needed to make the injured plaintiff whole.[89] They are most often awarded in tort cases where the defendant has engaged in particularly egregious conduct, although they also may be recoverable in rare instances of breach of contract[90] as well as in other civil matters where authorized by statute or judicial precedent.[91]

As the United States Supreme Court has recognized, "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[92] Typically, the standards for punitive recovery require proof that the defendant acted in an extreme manner. Depending on the jurisdiction, such extremity may be established by showing that the defendant's conduct was "outrageous,"[93] "willful,"[94]

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[88] *See infra* notes 111–35 and accompanying text.

[89] *See e.g.*, KEETON ET AL., *supra* note 56, § 2, at 9.

[90] Ordinarily, "[p]unitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable." RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

[91] *See, e.g.*, State Farm Fire & Casualty Co. v. Nicholson, 777 P.2d 1152, 1157–58 (Alaska 1989); Walker v. Gateway Nat'l Bank, 799 S.W.2d 614, 617 (Mo. Ct. App. 1990); SHV Coal v. Continental Grain Co., 587 A.2d 702, 704–05 (Pa. 1991).

[92] BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1595 (1996).

[93] *See, e.g.*, *Nicholson*, 777 P.2d at 1158; *Walker*, 799 S.W.2d at 617; *SHV Coal*, 587 A.2d at 704.

[94] *See, e.g.*, Fickling & Walker Co. v. Giddens Constr. Co., 376 S.E.2d 655, 659 (Ga. 1989); Kang v. Harrington, 587 P.2d 285, 291 (Haw. 1978); Pendowski v. Patent Scaffolding

"oppressive,"[95] "malicious,"[96] "wanton,"[97] in "reckless" or "conscious" indifference to the interests of another,[98] "aggravated,"[99] "fraudulent,"[100] "grossly negligent,"[101] or otherwise egregious under the applicable legal phraseology. In some contexts, the plaintiff seeking punitive recovery must establish the extremity of the defendant's behavior by a heightened proof standard of clear and convincing evidence.[102]

Co., 411 N.E.2d 910, 911 (Ill. Ct. App. 1980); Nevada Cement Co. v. Lemler, 514 P.2d 1180, 1183 (Nev. 1973); Reed v. Clark, 286 S.E.2d 384, 388 (S.C. 1982); Clayton v. Crossroads Equip. Co., 655 P.2d 1125, 1131 (Utah 1982).

[95] *See, e.g.*, Aetna Life Ins. Co. v. Lavoie, 470 So. 2d 1060, 1076 (Ala. 1989); Colonial Life & Accident Ins. Co. v. Superior Court, 647 P.2d 86, 90 (Cal. 1982); Oden v. Russell, 251 P.2d 184, 187 (Okla. 1952); Mayer v. Frobe, 22 S.E. 58 (W. Va. 1895).

[96] *See, e.g.*, Gutridge v. Pen-Med, Inc., 239 A.2d 709, 715 (Del. Super. Ct. 1967); Bethel v. Van Stone, 817 P.2d 188, 195 (Idaho Ct. App. 1991); Smith v. Peterson, 282 N.W.2d 761, 767 (Iowa Ct. App. 1979); Pettengill v. Turo, 193 A.2d 367, 374 (Me. 1963); Schaefer v. Miller, 587 A.2d 491, 492 (Md. 1991); Vratsenes v. N.H. Auto, Inc., 289 A.2d 66, 67 (N.H. 1972); Peckham v. Hirschfeld, 570 A.2d 663, 669 (R.I. 1990); Gardner v. Kerly, 613 S.W.2d 795, 796 (Tex. Civ. App. 1981); Peacock Buick, Inc. v. Durkin, 277 S.E.2d 225, 227 (Va. 1981).

[97] *See, e.g.*, Holloway Constr. Co. v. Smith, 683 S.W.2d 248, 250 (Ky. 1984); Joachim v. Crater Lake Lodge, Inc., 617 P.2d 632, 635 (Or. Ct. App. 1980); Poling v. Wisconsin Physicians Serv., 357 N.W.2d 293, 298 (Wis. Ct. App. 1984).

[98] *See, e.g.*, Wallace v. Dustin, 681 S.W.2d 375, 377 (Ark. 1984); White v. Brock, 584 P.2d 1224, 1227 (Colo. Ct. App. 1978); Vandersluis v. Weil, 407 A.2d 982, 986 (Conn. 1978); Hanks v. Hubbard Broad., Inc., 493 N.W.2d 302, 311 (Minn. Ct. App. 1992).

[99] *See, e.g.*, O'Brien v. State Street Bank & Trust Co., 401 N.E.2d 1356, 1359 (Ill. Ct. App. 1980); Newton v. Standard Fire Ins. Co., 229 S.E.2d 297, 301 (N.C. 1976).

[100] *See, e.g.*, Gibson v. Western Fire Ins. Co., 682 P.2d 725, 740 (Mont. 1984); John Deere Co. v. Nygard Equip., Inc., 225 N.W.2d 80, 95 (N.D. 1974); Leichtamer v. American Motors Corp., 424 N.E.2d 568, 579 (Ohio 1981).

[101] *See, e.g.*, Valdez v. Cillessen & Son, Inc., 734 P.2d 1258, 1264–65 (N.M. 1987); Patrick v. Ronald Williams, Prof'l Ass'n, 402 S.E.2d 452, 459 (N.C. Ct. App. 1991); Inland Container Corp. v. March, 529 S.W.2d 43, 44–45 (Tenn. 1975). *But see* White Constr. Co., v. DuPont, 455 So. 2d 1026, 1028 (Fla. 1984) (finding gross negligence alone insufficient to warrant punitives); Danculovich v. Brown, 593 P.2d 187, 191 (Wyo. 1979) (same).

[102] *See, e.g.*, ALASKA STAT. § 09.17.020 (Michie 1996) (requiring proof of entitlement to punitive damages by clear and convincing evidence); CAL. CIV. CODE § 3294(a) (West Supp. 1997) (same); GA. CODE ANN. § 51-12-5.1(b) (Supp. 1996) (same); OHIO REV. CODE ANN. § 2315.21(C)(3) (Anderson 1995) (same); S.C. CODE ANN. § 15-33-135 (Law Co-op. Supp. 1996) (same); Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 681 (Ariz. 1986) (construing state's common law to require clear and convincing proof for punitive damages); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633, 657 (Md. 1992) (same). Colorado goes even further, statutorily requiring proof beyond a reasonable doubt to support a punitive damages award. *See* COLO. REV. STAT. § 13-25-127(2) (1987).

The rationale for the remedy of punitive damages is twofold.[103] First, punitive damages are literally aimed at punishing the defendant adjudged to

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[103] These dual purposes are recognized in the *Restatement (Second) of Torts*. *See* RESTATEMENT (SECOND) OF TORTS § 908(1) (1979) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to *punish* him for his outrageous conduct and to *deter* him and others like him from similar conduct in the future.") (emphasis added).

David Owen has further subdivided the functions of punitive damages into five categories: (1) education, (2) retribution, (3) deterrence, (4) compensation, and (5) law enforcement. *See* David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 373–81 (1994) [hereinafter Owen, Overview]. I agree with Professor Owen that all of those functions can be isolated, and at least four of them are very important. For purposes of my own analysis, the educative and law enforcement aspects of punitive damages awards are subsumed under what is described above as "deterrence." The tendency for a punitive award to educate the defendant and others about the wrongfulness of conduct, as well as the enforcement incentives created by making punitive recoveries available to injured victims, both serve to deter future wrongful behavior. Retribution is basically synonymous with what courts have most often called the "punishment" goal of punitive damages, and I shall use those two terms here interchangeably.

As to compensation, there are undoubtedly times when a punitive damages award *results in* compensating injured plaintiffs with funds that might cover all or part of those aspects of their actual damages which, for some legal reason, they cannot collect through a compensatory award. As identified by Owen, *see id.* at 378–79, and others, these ordinarily nonrecoverable sums may include such things as nonquantifiable lost opportunities or damaged personal relationships caused by the defendant's conduct, as well as plaintiff's attorneys fees in cases where there is no statutory authority to shift those fees to the losing defendant. *See also* Bruce Chapman & Michael Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741, 761–79 (1989) (examining the compensation rationale for punitive damages as including, inter alia, loss of dignity suffered by victim); David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1295–99 (1976). However, unlike the other cited purposes of punitive damages, it strikes me that the incidental compensatory effect of a generous punitive award in offsetting such losses for a particular plaintiff is more fortuity than design; jury instructions on punitive damages tend to focus mainly on factors of punishment and deterrence, not compensation. *See, e.g.*, 3 EDWARD J. DEVITT ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 85.19 (4th ed. 1987) (mentioning nothing about any compensatory purposes in sample jury charge on punitive damages). The distinctive feature of punitive damages is that they are imposed over and above what the law of damages has defined (perhaps, indeed, too narrowly) as "compensatory." *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) ("[Punitive damages]" are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); *see also* 1 JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES LAW AND PRACTICE, table 4-1, at 47–52 (1995) (concluding that only three states recognize a compensatory function for punitive damages).

have engaged in wrongdoing. By compelling the defendant to "pay for" its conduct with damages that exceed the compensatory sum required to make the injured plaintiff whole (or, in some contract breach settings involving especially flagrant conduct, exceeding the amount that would provide the plaintiff with the full expected benefits of the original bargain), punitive damages exact a measure of retribution. This penal effect can vindicate not only the rights of the injured victim but also the interests of society at large in responding to wrongful behavior with an exemplary sanction. The culpable defendant is singled out in the judicial process as a wrongdoer, and forced to pay a penalty that recognizes the severity of its conduct.

The second well-established rationale for punitive damages is deterrence, both general and specific in nature. The threat of punitive damages is designed to deter others generally from engaging in wrongful conduct akin to the defendant's. The punitive award also is imposed to deter the defendant specifically from repeating such egregious behavior in the future. These deterrence notions reflect policy concerns that, absent punitive damages, merely requiring an outrageous civil wrongdoer to pay only compensatory relief in the few instances where the wrongdoer is actually sued and found liable for such behavior will give such societal "bad actors" incentives to continue to flout their legal duties. Without the added deterrent of punitive damages, the wrongdoer may be willing to take its chances on being exposed, pursued, and held liable, and may regard the exposure that it faces for simple compensatory damages when it is "caught" by the civil justice system as an acceptable cost of doing business. Punitive damages make the price of noncompliance much higher, ideally in an amount that is sufficient to deter other instances in spite of the inevitable fact that some extreme civil wrongs will evade legal redress.

The punishment and deterrence that can be achieved through imposing punitive damages on private actors advance the societal goals of accountability. To punish another is surely one means of making that party "account" for the party's wrongful behavior. Further, to deter other wrongful behavior through imposing civil penalties (at least on that segment of wrongdoers who have been judicially held liable for it) can help foster accountability to the rule of law—in general and with specific regard to the individual defendant. The remedy can promote both respect for the law as well as more compliance with it. Or, to state it conversely, without the prospect of punitive damages, private wrongdoers may have even less reason to be accountable for their deviations from legal norms.

For these reasons, I stick with the more conventional two-part justification of punitive damages in my analysis herein, recognizing that the broad categories of punishment and deterrence do incorporate many related subcategories.

To be sure, the efficacy of our system of punitive damages has been widely questioned. Commentators,[104] legislators,[105] and courts[106] have all recently advocated or taken measures to address perceived drawbacks in the application of punitive damages liability in practice. At times juries have awarded punitive damages that are in some sense disproportionate to the severity of the defendant's behavior. Such excessive awards are subject, of course, to judicial oversight, both at the trial level through postverdict motions and thereafter through appellate review. In some cases, the procedures by which punitive damages are imposed fail to meet constitutional standards of due process. Here again, judicial oversight is available to check and remedy those deviations, guided by the constitutional pronouncements of the United States Supreme Court in a line of recent cases.[107] There are also concerns that in cases where

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[104] As a mere sampling, *see, e.g.*, E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989) (contending that jury awards of punitive damages are generally too delayed, inconsistent, and weak to deter corporate wrongdoing); Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 ALA. L. REV. 975 (1989) (criticizing current process of awarding punitive damages as unconstitutional and unfair); Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983) (arguing for greater substantive and procedural controls to ward against unconstitutionally imposed punitive damages). *See generally* Owen, Overview, *supra* note 103 (summarizing and responding to criticisms of punitive damages and reform proposals).

[105] Many state statutes, for example, now limit the maximum sums recoverable as punitive damages. See the discussion about such "caps," *infra* note 127 and accompanying text.

[106] For instance, the United States Supreme Court has issued a series of opinions in the past decade pronouncing the constitutional limits on punitive damages recovery. *See infra* note 107.

[107] The Supreme Court has decided four cases in the last five years declaring that state punitive damages awards are subject to federal constitutional review under the Due Process Clause of the Fourteenth Amendment. *See* BMW of North Am. v. Gore, 116 S. Ct. 1589 (1996) (reversing as constitutionally excessive state court's $2 million punitive damages award in consumer fraud action where plaintiff's actual damages were $4000); Honda Motor Co. v. Oberg, 512 U.S. 1162 (1994) (striking down state constitutional provision that had precluded judicial review of punitive damages awards absent total lack of evidence to support the verdict); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443 (1993) (finding that $10 million punitive damages award was not so "grossly excessive" as to violate due process in light of defendant's malicious and fraudulent course of conduct, and that state court's procedures in making the award comported with due process); Pacific Mut. Life Ins. v. Haslip, 499 U.S. 1 (1991) (declaring that state punitive damages are constitutionally reviewable under the Due Process Clause, but sustaining imposition of over $800,000 punitive damages award against insurer that was supportable with objective criteria and which had been subject to a panoply of procedural protections in the state court).

punitive damages are claimed for spurious reasons, innocent defendants may be induced to factor a premium into their preverdict settlement offers to eliminate the outside "wild-card" risk of punitive liability if the case were tried. Such tactical abuse in threatening an adversary with punitive exposure can at least be addressed, if not eliminated altogether, through a variety of means at the disposal of the courts, the legislatures, and the litigants themselves.[108]

Despite the difficulties of administering the law of punitive damages with precision, forty-nine of the fifty states[109] continue to authorize the recovery of such exemplary sums from private actors who have engaged in egregious conduct. This widespread usage arguably reflects a consensus that the basic policy justifications underlying punitive damages remain valid, even if the legal system should do a better job in implementing those policies. It also reflects an implicit recognition that the penalties that government itself might extract from

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In striking down the punitive damages award in *BMW*, the Court articulated three factors that led it to conclude the award was grossly excessive: (1) the limited degree of reprehensibility of defendant's conduct in not disclosing that the car it sold to plaintiff had been repainted; (2) the disparity between plaintiff's actual (or potential) harm and the amount of punitive damages; and (3) the lesser magnitude of governmental penalties authorized to sanction similar misconduct. *See BMW*, 116 S. Ct. at 1598–1604. Admittedly, these factors are difficult to administer in practice. Nevertheless, the Supreme Court's recent jurisprudence in this area signals that the Court will not allow state judgments for punitive damages to "run wild." *See Pacific Mut.*, 499 U.S. at 18; *cf.* Browning-Ferris Indust. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) (rejecting constitutional attack under the Excessive Fines Clause of the Eighth Amendment on state punitive damages awards in cases involving only private litigants).

[108] For instance, the courts may strike punitive damages claims prior to trial where there is no genuine basis in the allegations to justify such relief, may sanction attorneys when they have made frivolous demands for punitive recovery, or may bifurcate trials to avoid tainting jurors in the liability phase with evidence of the defendant's financial condition that would be relevant only in the punitive damages phase.

[109] Punitive damages are unrecoverable in Nebraska, having been declared invalid per se under that state's constitutional limitation on penalties. *See* Distinctive Printing & Packaging Co. v. Cox, 443 N.W.2d 566, 574 (Neb. 1989). In addition, four states—Louisiana, Massachusetts, New Hampshire, and Washington—disallow punitive damages except for categories of cases where such recovery has been specifically authorized by statute. *See* MASS. GEN. LAWS ANN. ch. 106, § 1-106 (West 1990); N.H. REV. STAT. ANN. § 507.16 (Supp. 1983); WASH. REV. CODE § 64.34.100 (1994); Billiot v. BP Oil Co., 617 So. 2d 28 (La. Ct. App. 1993), *rev'd on other grounds*, 645 So. 2d 604, 618 (La. 1994). Three of those states disallowing punitives under the common law, however, do have various statutes that legislatively permit their recovery in specific classes of cases. *See* LA. CIV. CODE ANN. art. 2315.4 (West 1976 & Supp. 1996) (authorizing punitive damages against wanton or reckless drunk driver); MASS. GEN. LAWS ANN. ch. 111, § 199 (West 1996) (authorizing punitives for failure to correct dangerous lead paint levels in dwellings); WASH. REV. CODE ANN. § 9A.36.080 (West 1996) (allowing punitives in malicious harassment actions).

societal wrongdoers, through criminal prosecutions or through regulatory enforcement, need to be supplemented with civil sanctions imposed in private suits by injured citizens. No matter how many statutes and regulations are drafted with penalty provisions, those penalties are hollow if the government is unable or unwilling to enforce them. Private litigation can aid in assuring that the law is taken seriously by allowing "private attorneys general" to recover punitive remedies in appropriate circumstances.

B. *Why Public Entites Are Often Immune from Punitive Damages*

The logic for punitive damages has been thought to collapse, however, where a public entity is the defendant. The dual purposes of imposing such damages—punishment and deterrence—do not as readily apply to the government qua government as they do to a private actor. Since courts are an instrument of the sovereign state, it seems rather oxymoronic for the sovereign literally to be "punishing" itself, through allowing its courts to impose monetary judgments for punitive damages against that very same sovereign.[110] Unlike private actors, the government possesses, in theory at least, unlimited powers to raise funds through taxation. As a consequence of that power to tax, there may be little or no retributive impact from slapping a public entity with punitive damages.[111] The public entity may simply raise taxes (or reallocate taxpayer

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[110] The analogy to self-inflicted punishment is inapt, of course, where the public entity defendant is not part of the same government whose court is awarding the punitive damages. For example, a federal court would not be punishing the United States when it is asked to impose punitive damages on a state or municipal public entity or on a foreign sovereign for violations of federal law. States, however, are nevertheless constitutionally immune from such damages in federal court absent a waiver under the Eleventh Amendment. In addition, foreign sovereigns are immune from punitive damages under the Foreign Sovereign Immunities Act. *See* 28 U.S.C. § 1606 (1996) (mandating, despite the general statutory waiver of foreign states' sovereign immunities in the United States courts, that "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages"). The legislative history to § 1606 reflects that such immunity from punitive damages "accords with current international practice." H.R. REP. NO. 94-1487, at 10 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6609.

[111] The defendant's wealth has been widely recognized as a factor that a jury may properly consider in assessing punitive damages. *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 103, § 908, cmt. e (stating that a defendant's wealth may be considered so that "the degree of punishment or deterrence resulting from a [punitive] judgment is to some extent in proportion to the means of the guilty person"). This factor may be misleading where the defendant is a governmental entity that derives its "wealth" from tax revenues collected from the public at large. The wealth of the sovereign in a representative democracy theoretically is either the cumulative wealth of the people that may be taxed (since the people ultimately fund their government's liabilities), or it is zero (since the government owns

revenues from other programs) in an amount sufficient to absorb the liability. Or the government may refuse to pay the punitive award, which may leave the plaintiff judgment-creditor with little means of enforcement or vindication. Under these scenarios, the government itself is not "hurt" by punitive damages; any pain is instead felt by the public in the form of higher taxes or diminished programs and services in other areas.

Second, it is debatable whether much deterrence can be gained by imposing punitive damages on governments. Given the theoretically unlimited[112] power of government to raise revenue, it would seem that there can be no amount of punitive damages that could economically deter wrongful government conduct.[113] Moreover, as noted above, other means exist in our democratic system to create incentives for government actors to refrain from behaving irresponsibly. Elected officials, after all, can be voted out of office despite the strategic advantages of incumbency. They also can be motivated by public opinion, the media, and others who will criticize them for engaging in wrongful conduct or for not rectifying it when it is committed by their subordinates.[114] Criminal prosecutions and legislative oversight also can check errant behavior

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nothing independent of its people). Either characterization of the government's wealth presents complications in calculating an award that will hurt and deter the sovereign.

[112] I recognize that there are political and philosophical constraints on that theoretically infinite power to tax. But unless the punitive damages award against the government is ignored, those constraints signify the need to divert treasury dollars from other public uses in order to pay it. The detrimental impact on other public services deprived of those funds arguably could result in some deterrence of future governmental misdeeds that could produce punitive recoveries. Governmental leaders theoretically would want to guard against such future punitive exposures that could drain their treasuries even further. However, phenomena such as the lingering deficit of the United States Government's budget and the recent bankruptcies or near-bankruptcies of a number of municipalities and counties lead me to conclude that political leaders are not as concerned about prospective liabilities in general as they could or should be.

[113] Punitive sanctions against the government arguably might produce some benefits in general deterrence with respect to private actors who observe that even their own government can be penalized for wrongdoing. This is the "exemplary" aspect of punitives. On the other hand, private wrongdoers might perversely regard the government's ultimate ability to "get away with" its own misdeeds by passing on its punishment to taxpayers or to the would-be beneficiaries of other publicly funded programs as an additional reason for moral indifference to the law.

[114] Reining in the unelected subordinates that work for elected officials can be a formidable task, given the constraints presented by public employee union contracts, civil service rules, First Amendment limits on patronage, and the organizational quirks of large public agencies. Nevertheless, as I noted earlier in this Article, *see supra* notes 31–42 and accompanying text, public employees are still closer to the forces of democratic accountability than commercial enterprises that are hired now and then by one or more public entities.

by public officials. While these deterrence mechanisms are not perfect, and some of them (such as adverse publicity and criminal laws) also can influence the conduct of private actors, they do offer the means to discourage wrongdoing in the public sector. As such, they abate the need in that arena for punitive damages.

The United States Supreme Court embraced these arguments in holding that municipalities are not subject to punitive damages in civil rights actions brought under 42 U.S.C. § 1983.[115] In *Newport v. Fact Concerts, Inc.*,[116] the Supreme Court reasoned that neither the retributive nor deterrent aims of punitive damages are well served when they are imposed upon a public entity. As to punishment and retribution, Justice Blackmun's opinion of the Court stated:

> [I]t remains true that an award of punitive damages against a municipality "punishes" only the taxpayer who took no part in the commission of the tort. . . . Indeed, punitive damages imposed on a municipality are in effect a windfall to a fully compensated plaintiff, and are likely accompanied by an increase in taxes or a reduction in public services for the citizens footing the bill. *Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers.*[117]

Justice Blackmun went on to question whether government itself can harbor the requisite state of mind to be subject to punishment:

> Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. . . . A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for *punitive* purposes, therefore, are not sensibly assessed against the governmental entity itself.[118]

With equal force, the Court in *Newport* cast aside the prospect that imposing punitive damages on municipalities might be a worthwhile deterrent. The Court expressed skepticism that public officials would be deterred from wrongdoing by the notion that large punitive damages could be assessed based on the wealth of their municipality.[119] Further, the Court found "no reason to suppose that corrective action, such as the discharge of offending officials who

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[115] 42 U.S.C. § 1983 (1994).

[116] 453 U.S. 247 (1981).

[117] *Id.* at 267 (emphasis added).

[118] *Id.* (emphasis added).

[119] *See id.* at 269.

were appointed and the public excoriation of those who were elected, will not occur unless punitive damages are awarded against the municipality."[120] The Court concluded that these democratic incentives to take corrective action, coupled with the deterrence gained from imposing compensatory damages on public entities and from imposing both compensatory and exemplary damages on public officials individually,[121] make it unnecessary to impose punitive damages on government itself.[122]

Apart from these substantive reasons for immunizing public entities from punitive damages, *Newport* also recognized what I have described above as purely fiscal reasons for preserving a sovereign immunity. In its fiscal analysis, the Court initially emphasized the very expansive range of governmental activities that could trigger a punitive damages award:

> [M]unicipalities and other units of state and local government face the possibility of having to assure compensation for persons harmed by abuses of governmental authority covering a large range of activity of everyday life. To add the burden of exposure for the malicious conduct of individual government employees may create a serious risk to the *financial integrity* of these governmental entities.[123]

Additionally, the Court expressed concern that juries, who could be prejudiced[124] by the realization that government's pockets are deep if not

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[120] *Id.*

[121] The Court noted that many state laws requiring municipalities to indemnify their employees for tort judgments arising out of official duties preclude such indemnification where the judgments are based on the employee's malicious or willful misconduct. *See id.* at 270 n.30. This reference by the Court underscores the importance of the relationship between principles of immunity from punitive damages and policies relating to the indemnification of such damages. *See infra* notes 152–65 and accompanying text.

[122] *See Newport*, 453 U.S. at 270–71.

[123] *Id.* at 271 (emphasis added).

[124] Jurors might also be prejudiced against public entity defendants out of sheer dissatisfaction with government in general. Of course, other large institutions such as multinational corporations, trade associations, labor unions, or organized religious bodies can also be perceived by jurors as unpopular defendants. Judges can weed out some of these prejudices by voir dire, juror instructions, or the remittitur or reversal of excessive punitive verdicts. What makes the government unique, however, is that when these corrective judicial measures fail to catch such juror excesses, the costs of the verdict are borne by *all* members of the community rather than only those segments of the populace that happen to consume the defendant corporation's product (or invest in or work for the corporation) or who are members of the defendant labor union, and so on. The public at large is broader than any identifiable constituencies of a single private enterprise, no matter how enormous it may be.

unbounded, may inflate punitive damage awards against public entities to catastrophic dimensions:

> Because evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded, the unlimited taxing power of a municipality may have a prejudicial effect on the jury, in effect encouraging it to impose a sizable award. *The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial, and we are sensitive to the possible strain on local treasuries and therefore on services available to the public at large.* Absent a compelling reason for approving such an award, not present here, we deem it unwise to inflict the risk.[125]

For these combined substantive and fiscal reasons, the Court in *Newport* construed the federal civil rights laws in a fashion that provides defendant public entities with absolute immunity from punitive damages.[126]

In like manner and in a variety of substantive contexts, most states have laws prohibiting the recovery of punitive damages from public entities.[127] At least thirty-seven states and the District of Columbia have statutes fully or partially immunizing public entities from punitive damages.[128] Other states have

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[125] *Newport*, 453 U.S. at 271–72 (footnotes omitted) (emphasis added).

[126] However, public *employees* remain subject to punitive damages in § 1983 actions. *See, e.g.*, Smith v. Wade, 461 U.S. 30, 31 (1983) (holding a state employee liable for punitive damages in civil rights action under 42 U.S.C. § 1983, despite nonrecoverability of such damages under § 1983 from the state itself).

[127] *See generally* 18 EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 53.18.10, at 247–51 (3d ed. 1993) (noting that in the "overwhelming majority of jurisdictions" punitive damages are not recoverable unless expressly authorized by statute); Joel E. Smith, Annotation, *Recovery of Exemplary or Punitive Damages from Municipal Corporation*, 1 A.L.R. 4TH 448 (1995) (collecting and analyzing cases in which municipal corporations have been subject to punitive damages).

[128] *See* ALA. CODE § 6-11-26 (1993) (stating that punitive damages are unrecoverable from all public entities except for those covered under state Medical Liability Act); ARIZ. REV. STAT. ANN. § 12-820.04 (West 1996) (public entities immune from punitives); ARK. CODE ANN. § 21-9-203 (Michie 1996) (declaring state not liable to pay for punitive damages awarded against state employees); CAL. GOV'T CODE § 818 (West 1980) (public entities immune from punitives); COLO. REV. STAT. § 24-10-114(4) (1990) (same); CONN. GEN. STAT. § 29-8a (1988) (disallowing state from indemnifying defense costs of state policeman found liable for punitive damages); D.C. CODE ANN. § 1-1188.2 (1991) (eliminating liability of district government for punitive damages in contract actions); *id.* § 1-1223 (immunizing district from punitive damages in unjust imprisonment suits); FLA. STAT. ANN. § 768.28(5) (West 1986) (mandating state and its agencies and subdivisions as immune from punitive damages in tort actions); GA. CODE ANN. § 50-21-30 (1994) (state immune from punitive damages in tort actions); HAW. REV. STAT. § 662-2 (1993) (same); IDAHO CODE § 6-918

case law barring such recovery.[129] As the Supreme Court observed in *Newport*, courts dating back to at least the nineteenth century have overwhelmingly

(1994) (governmental entities immune from punitives); ILL. STAT. ANN. ch. 10, § 2-102 (Smith-Hurd 1993) (local public entities immune from punitives); IND. CODE ANN. § 34-4-16.5-4 (West 1983) (governmental entities immune from punitives); IOWA CODE ANN. § 669.4 (West Supp. 1995) (state immune from punitives); KAN. STAT. ANN. § 75-6105(c) (1989) (governmental entities immune from punitives); ME. REV. STAT. ANN. tit. 14, § 8105(5) (West 1980) (same); MD. ANN. CODE art. 23A, § 1A(b) (1994) (extending immunity from punitives damages for municipal corporations in contract actions); MD. CODE ANN., CTS. & JUD. PROC. §§ 5-321(a), 5-322(a), 5-323 (1995) (making municipal corporations, counties, and chartered counties immune from punitives in contract actions); *id.* § 5-399.2(a)(1), (d) (state immune from punitives in tort and contract actions); *id.* § 5-403(c) (local governments immune from punitives); MASS. GEN. LAWS ANN. ch. 258, § 2 (West 1988) (public employers immune from punitives); MINN. STAT. ANN. § 3.736(3) (West 1977) (state immune from punitives); *id.* § 466.04(b) (municipalities immune from punitives); MISS. CODE ANN. § 11-46-15 (Supp. 1995) (governmental entities immune from punitives); MO. ANN. STAT. § 537.610(3) (West 1988) (public entities immune from punitives); MONT. CODE ANN. § 2-9-105 (1977) (state and other governmental entities immune from punitives); NEV. REV. STAT. ANN. § 41.035(1) (Michie 1996) (state, state agencies, and political subdivisions immune from punitives); N.H. REV. STAT. ANN. § 507-B:4(II) (Supp. 1994) (eliminating punitives recoverable against governmental units for bodily injury, personal injury, or property damage); N.J. STAT. ANN. § 59:9-2 (West 1992) (public entities immune from punitives); N.M. STAT. ANN. § 41-4-19(B) (Michie 1995) (governmental entities immune from punitives in tort actions); N.D. CENT. CODE § 32-12.2-02(2) (1976) (declaring that state immune from punitives and cannot be ordered to indemnify state employee for punitive liability); OHIO REV. CODE ANN. § 2744.05(A) (Anderson 1992) (political subdivisions immune from punitives); OKLA. STAT. ANN. tit. 51, § 154(B) (West 1988) (state and political subdivisions immune from punitives); OR. REV. STAT. § 30.270(2) (1993) (public bodies immune from punitives); 42 PA. CONS. STAT. ANN. § 8528 (West 1982) (limiting recoverable damages against Commonwealth to various categories of nonpunitive compensatory relief); S.C. CODE ANN. § 15-78-120(b) (Law Co-op. Supp. 1995) (governmental entities immune from punitives); TEX. CIV. PRAC. & REM. CODE § 101.024 (West 1988) (same); UTAH CODE ANN. § 63-30-24 (1986) (same); VA. CODE ANN. § 8.01-195.3 (Michie 1995) (commonwealth and public transportation districts immune from punitives); W. VA. CODE § 29-12A-7 (1995) (political subdivisions immune from punitives); WIS. STAT. ANN. § 893.80(3) (West 1983) (governmental subdivisions and agencies, political corporations, and volunteer fire companies immune from punitives); WYO. STAT. § 1-39-118(d) (1995) (governmental entities immune from punitives).

[129] *See, e.g.*, Sharapata v. Town of Islip, 437 N.E.2d 1104, 1106-08 (N.Y. 1982) (declaring that state's general waiver of sovereign immunity did not expose it and its political subdivisions to punitive damages, noting that the twin justifications of deterrence and punishment for such damages are not advanced when defendant is a public entity); *see also* Hazen v. Municipality of Anchorage, 718 P.2d 456, 465-66 Alaska 1986) (adopting reasoning of *Newport* in holding that punitive damages are unrecoverable under state law from Alaska municipalities); Tipton County Bd. of Educ. v. Dennis, 561 S.W.2d 148, 152-

treated public entities as immune from punitive damages.[130] In applying this immunity, state courts have shared the Supreme Court's belief that the retributive and deterrent purposes underlying punitive damages do not aptly relate to defendants that are governmental entities.

The federal government likewise has been shielded in various respects from punitive damages. The FTCA, which was first enacted in 1946, waives the sovereign immunity of the United States from private tort claims but explicitly precludes its liability for punitive damages.[131] The FTCA's punitive immunity is of major significance because tort claims are a frequent vehicle of recovery for persons injured by governmental conduct. Nor are punitive damages recoverable against federal agencies in breach of contract actions.[132] Similarly, federal instrumentalities that have "sue-and-be-sued" status (such as the Federal Deposit Insurance Corporation or the Tennessee Valley Authority) are presumed to be immune from punitive damages in the absence of express statutory authorization subjecting them to such liability.[133] Additionally, courts

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53 (Tenn. 1978) (adopting, as the common law of Tennessee, the "weight of authority" that deems punitive damages unrecoverable from municipal or local governments on grounds of public policy).

[130] Newport v. Fact Concerts, Inc., 453 U.S. 247, 259–60 (1981).

[131] The very first sentence of the FTCA declares that "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, *but shall not be liable* for interest prior to judgment or *for punitive damages*." 28 U.S.C. § 2674 (1994) (emphasis added).

[132] There do not appear to be any reported cases from the Court of Federal Claims or from other federal courts in which punitive damages were imposed on the United States Government as a remedy for its breach of contract. This dearth of precedent is not surprising, since punitive awards are exceedingly rare even in private contract suits. Moreover, if courts followed the principle of section 355 of the *Restatement (Second) of Contracts*, they would only impose punitive damages in those contract actions in which the conduct of the federal agency constituting the breach also amounted to a flagrant tort. *See* RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 90, § 355. Since the United States is immune under the FTCA for punitive damages in tort cases, and generally immune under the FTCA for many forms of intentional torts by its employees, it stands to reason that a court would find the imposition of punitive damages in a contract case against the government would contravene the purposes of those statutory provisions.

[133] *See* Springer v. Bryant, 897 F.2d 1085, 1089 (11th Cir. 1990) (TVA immune from punitive damages); Commercial Fed. Sav. Bank v. Federal Deposit Ins. Corp., 872 F.2d 1240, 1247 (6th Cir. 1989) (FDIC immune); Smith v. Russellville Prod. Credit Ass'n, 765 F.2d 109, 113 (8th Cir. 1985) (punitive immunity for production credit associations formed under 12 U.S.C. § 2093(4)(1982)); Doe v. American Nat'l Red Cross, 837 F. Supp. 121, 122 (E.D.N.C. 1992) (Red Cross, as sue-and-be-sued federal instrumentality, did not waive sovereign immunity from punitive damages). *See generally* Missouri Pacific R.R. Co. v.

are reluctant to imply from ambiguous or general statutory language a waiver of the government's traditional immunity from punitive liability.[134]

The picture that emerges is that public entities at all levels of government are substantially insulated from liability for punitive damages. Although that immunity principle is not universal[135] it is certainly dominant. That dominance reflects widespread judicial and legislative determinations that the accountability of public entities can and should be achieved by methods other than trying to impose some form of punishment on those sovereignties when they violate their own laws.

IV. PUNITIVE DAMAGES LIABILITY AS AN ACCOUNTABILITY MECHANISM IN AN ERA OF PRIVATIZATION

As described at the outset of this Article, the number of governmental functions performed exclusively by public employees may well be on the wane. Commercial enterprises are stepping in the breach. In this era of mounting interest in the privatization of public services, should the rules of the game that insulate the government from punitive damages be left intact when a private contractor fills government's shoes? Or should the enterprise be treated as it normally is treated in private litigation, *i.e.*, exposed to punitive damages when its conduct meets the applicable legal standards of egregiousness?

To date, the reported law directly addressing these specific issues is sparse and unenlightening. A few statutes do confer immunity from punitive damages on government contractors engaged in specified activities.[136] There have also

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Ault, 256 U.S. 554 (1921) (holding federal instrumentalities that are generally subject to suit are immune from penalties authorized under federal law absent express congressional waiver of such immunity).

[134] *See, e.g.*, United States Dep't of Energy v. Ohio, 503 U.S. 607 (1994) (holding that federal agencies are not liable for civil penalties for violations of water pollution laws because applicable statutes contain no clear expression of a waiver of sovereign immunity from such penal liabilities); *see also supra* note 69 and accompanying text.

[135] Since 1991, for example, federal agencies have been potentially liable for punitive damages for violations of the Civil Rights Act. *See* 42 U.S.C. § 1981a(a)(2) (1994); *Accord* Abbamont v. Piscataway Twp. Bd. of Educ., 650 A.2d 958, 964–65 (N.J. 1994) (holding that public entity employers are not immune from punitive damages under state's whistleblower statute).

[136] For example, the Price-Anderson Act, as amended in 1988, limits the ability of third parties to obtain punitive damages in suits against government contractors that operate nuclear power facilities, precluding such punitive recoveries to the extent that they would be high enough to expose the "layer" of indemnification that the United States contractually guarantees to nuclear operators under the Act. *See* 42 U.S.C. § 2210(s) (1994). As a state illustration, Nevada law expressly bars the recovery of punitive damages from private contractors that provide medical services for the state department of prisons. *See* NEV. REV.

been some cases in which judges have foreclosed, or at least called into question the efficacy of, an award of punitive damages against government contractors.[137] With privatization on the rise in heavily populated public

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STAT. § 41.0307(3)(b) (1996) (defining "immune contractors"); *id.* § 41.035(1) (disallowing punitive damages against such contractors). In addition, it might be argued—in my view erroneously—that states with tort claims statutes that generally immunize public entities and their agents from punitive damages have implicitly created a derivative immunity from punitive liability for government contractors if such contractors are not specifically excluded from the definitional scope of those statutes. *See supra* note 71 and accompanying text.

[137] In the consolidated Agent Orange products liability litigation brought by military personnel against manufacturers that supplied defoliant chemicals to the United States Government, the defendants had argued that they should not be liable for punitive damages because of their role as government contractors. In addressing that argument in the context of plaintiffs' motion for class certification, Federal Judge Weinstein of the Eastern District of New York raised policy concerns about the propriety of awarding punitive damages against the defendant contractors:

> Finally, there may be a policy against substantial punitive damages in a case such as this. An award of huge punitive damages might discourage government contractors from bidding for defense contracts and manufacturing material vitally needed for the national defense and might "seriously impair" the government's ability to formulate policy and make judgments pursuant to its war powers.
>
> Evidence that the government had almost as much, if not more, knowledge of the dangers posed by Agent Orange, and control by the government of its use are among the additional factors that would argue against punitive damages. It would be unfair to punish the defendants while the government, which might be equally, or even more, culpable, avoided all liability. Finally, merely instructing the jury as to punitive damages may distort the juror perceptions and make the case even more difficult to control.

In re Agent Orange Products Liability Litig., 100 F.R.D. 718, 727–28 (E.D.N.Y. 1983) (citations omitted). Despite these reservations, Judge Weinstein went on to conclude, without expressly indicating why, that "[n]evertheless, there is a substantial probability that limited punitive damages may be allowed." *Id.* at 728. Ultimately, Judge Weinstein did not need to resolve the punitive damages issue in *Agent Orange* because the class action settled for $180 million before trial. *See In re* Agent Orange Products Liability Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). The federal court not only approved the class settlement, but also rejected, on grounds of *Feres* immunity, the defendant contractor's third party claims against the United States for contribution and indemnity of the settlement funds. *See In re* Agent Orange Products Liability Litig., 611 F. Supp. 1221 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 204 (2d Cir. 1987).

For the reasons explained in this Article, *see infra* notes 137–51 and accompanying text, Judge Weinstein's stated qualms about awarding punitive damages against government contractors are (as he himself apparently was inclined to conclude) unpersuasive. No matter how vital an outsourced governmental need may be, it still is important to ensure that the private vendor filling that need remain accountable and that it refrain from egregiously

domains such as schools, prisons, and hospitals where many people are apt to be injured (and thereafter bring associated tort litigation), it is likely that the issue of shielding government contractors from punitive damages will arise more frequently. Injured citizens who in the past had sought punitive damages from government employees will now pursue such damages from the private entities that have taken over the government agency's operations. Concern over punitive damages is surely apt to come up more at the bargaining table in negotiating indemnity provisions in government contracts,[138] particularly in the

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wrongful behavior in the course of its public duties. As I argue, *infra* notes 152–67, there are potential ways through the bid process and through judicial oversight of jury awards to reduce any harmful side effects of leaving government contractors subject to punitive damages. Moreover, the court's eventual decision refusing to compel the Government to indemnify the contractor's settlement shares in *Agent Orange* reinforces my point that the government contractor, rather than the taxpaying public, should generally bear the risks of causing tortious injury, even if the taxpayer-supported government agencies involved might also share in the blame.

In another context, the Third Circuit has shielded government contractors of nuclear facilities from punitive damages in those instances where the government would be required, pursuant to the federally funded scheme of excess "insurance" for nuclear disasters, to indemnify the contractor for that liability. *See In re* Three Mile Island Litig., 605 F. Supp. 778, 784 (M.D. Pa. 1985), *aff'd*, 67 F.3d 1119 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1034 (1996). *Three Mile Island* essentially treats the punitive damages question for nuclear accidents occurring before the 1988 Amendments to the Price-Anderson Act (such as the 1977 disaster at Three Mile Island) in the same fashion as nuclear accidents occurring after the effective date of the 1988 Amendments. As indicated, *supra* note 74, the 1988 Amendments conferred on nuclear facility licensees and contractors a limited statutory immunity from punitive damages under 42 U.S.C. § 2210(s). *But see* Cook v. Rockwell Int'l, 755 F. Supp. 1468, 1481–82 (D. Colo. 1991) (holding that private contractors at fault in pre-1988 nuclear incidents may be held fully liable for punitive damages in spite of potential governmental indemnity, expressly disagreeing with the *Three Mile Island* court because of "the long line of cases holding that an indemnity agreement does not cloak a private party with sovereign immunity"); Crawford v. National Lead Co., 784 F. Supp. 439, 447 (S.D. Ohio 1989) (holding that a contractor is not immune from punitive damages for pre-1988 nuclear incident). Because of the unique statutory context of contracts involving nuclear facilities under the Price-Anderson Act, the courts' punitive damages rulings in *Three Mile Island* may be regarded as idiosyncratic. Moreover, as the district courts observed in *Cook* and *Crawford*, and as I try to demonstrate below, there is no conceptual reason (absent a statutory mandate such as that contained in the amended Price-Anderson Act for post-1988 nuclear incidents) to tie a government contractor's susceptibility to punitive damages to its contractual indemnification rights against the government. Indeed, as a policy matter, I contend below that such indemnification normally should be disfavored. *See infra* notes 163–64 and accompanying text.

[138] *See* Frank P. Grad, *Contractual Indemnification of Government Contractors*, 4 ADMIN. L.J. 433, 436 (1991) ("[I]t is likely that with the emergence of greater hazards in

growing number of states that have passed laws generally authorizing the indemnification of punitive damages. It also is likely to draw more attention in legislatures or courthouses in the form of statutes or case law that would extend the government's punitive damages immunity derivatively to its contractors, just as other immunities and special defenses have been extended in *Boyle* and elsewhere to contractors and other agents of the state.

A. *Punitive Damages as a "Bottom Line" Inducement to Contractors*

For a number of reasons, the temptation to confer such protection from punitives upon government contractors should be resisted. First, one must recall why punitive damages exist in the first place: as a mechanism of accountability to punish and deter flagrant violations of the law that injure others. The more that a society values the goal of accountability, the more attractive legal measures such as punitive damages become. Punitive damages are one way to curb wayward conduct and to make wrongdoers account for their misdeeds. Because the nature of such punishment is monetary, punitive damages ought to be of particular concern to business enterprises—which exist and are principally motivated to turn profits. Such damages directly affect a firm's financial well-being, particularly where they are calibrated appropriately to make the firm "sting" by reason of its wrongful conduct.

As we have seen, the government's traditional immunity from punitive damages is founded upon substantive and fiscal notions that appear unique to the sovereign itself. The government's elastic capacity to raise or divert revenues that could pay off virtually any punitive damages award is not shared by private actors. Nor is government's mission centrally defined by how much money it can make. Indeed, government has been comparatively indifferent at times to its budgetary deficits. Moreover, the government is accountable to the electorate that it serves through political means rather than economic means.[139]

So when a private enterprise that wins a government contract steps in to take on a public function, there is a quite dissimilar legal actor filling that role. Instead of a *politically* motivated, tax-*collecting* sovereign institution running the public schools, or the prisons, or the vehicle inspection lines, we can have a *profit*-maximizing, tax-*paying* private institution doing the job for us. That

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government contracting activities, there will be greater pressure to secure contractual indemnities.").

[139] Krent has observed that "[a]s a non-profit-maximizing actor, the government does not respond as directly to monetary signals." Krent, *supra* note 50, at 1539. Nevertheless, unlike private entities, "the government acts subject to considerable political checks and balances," mechanisms which Krent suggests "may serve as substitutes for private lawsuits to deter arbitrary government action." *Id.* at 1540.

private vendor is a creature in many ways unlike the government bureaucracy that it replaced. It thrives on different sustenance and it responds to different stimuli. It is not, in short, the *sovereign*. In fact, the fundamental distinctions between private and public organizations usually are cited as a main argument for privatizing itself: to achieve market incentives and efficiencies that cannot be duplicated by government agencies in-house.

We care enormously about many of the services that modern government has customarily provided to us: education, national defense, police protection, transportation systems, aid for the poor, the aged, and the infirm, and so on. The accountability of those who supply those public services is likewise of paramount importance. The very fact that these societal needs heretofore have been addressed, at least in part, by the government is indicative that leaving the fulfillment of those needs entirely to the private market has its shortcomings. In contracting out these activities, accountability mechanisms that are available under the law presumptively should be enhanced rather than diminished.

As was pointed out previously,[140] government often lacks the resources, the expertise, the knowledge, or the will to rein in its contractors effectively.[141]

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[140] *See supra* notes 43–50 and accompanying text. By way of further illustration, Marina Lao has highlighted various reasons why the Defense Department's control over large defense contractors has not been as vigilant as it could be. *See* Lao, *supra* note 45, at 359–60 (noting that Pentagon officials have lower incentives to contain costs than private actors, are prone to political "capture" by their contractors in working with them jointly to secure congressional appropriations, and can be influenced by "revolving door" personal relationships with defense firms that may be their former or future employers).

[141] Returning to the leash metaphor used above, one might envision a pet owner trying to control her two dogs with two leashes as she walks down the street. Imagine that the owner is holding a leash to her first dog. Now her other dog is added to the picture, and the owner ties a second leash directly from her first dog to that second dog. In such circumstances it will be tremendously difficult for the owner to exert any control over the second dog because her connection to the second dog is only indirect. If the first dog's leash is too loose, that dog may stray and thus enable the second dog to wander even further out of the owner's control. Alternatively, even if the first leash is tight, the second dog will still be able to stray far from the owner if its own leash to the first dog is loose. The owner's control over the second dog vastly improves, however, if the owner holds a leash tied *directly* to that dog.

By analogy, one might think of the public's control over government contractors in the same manner. If the public is the "owner," it cannot gain much control over a government contractor (*i.e.*, the second dog) by merely leashing that contractor to some government agency (*i.e.*, the first dog). The public's own leash (*i.e.*, the electoral process) that ties it to the government agency may be too loose to be effective. Likewise, even with tighter public controls over the agency, the leash that connects the private contractor to that agency (*i.e.*, the procurement contract) may be too loose. By allowing citizens to sue government contractors that have wrongfully inflicted injury, we in effect give the public a *direct* leash to such

Even where government is able and willing to serve in this oversight role, the best-drafted procurement contracts may still have loopholes that enable private vendors to evade effective agency scrutiny. The government might have a right to collect liquidated damages from the breaching vendor under its contract, but such recovery will be limited by the longstanding tenet that liquidated damages clauses will not be enforced if they amount to a penalty.[142] At best, government oversight is imperfect,[143] and it is liable to worsen as political trends push government itself to downsize and to spin off more and more of its functions.

Recognizing these limitations of government oversight, it makes sense to turn to supplemental forces to check contractor abuse. Specifically, this should include private litigation by citizens who are the intended beneficiaries of the public services that the contractors provide, or who are otherwise affected by the conduct of those contractors. Indeed, the people actually served and affected by the contractor on a day-to-day basis—the students, the patients, the inmates, the soldiers, the passengers, the consumers, and so on—may be in the optimal position to recognize contractor defalcations first-hand and have the greatest incentive to do something about it.

Tort suits, third-party beneficiary contract claims,[144] and other civil actions against contractors by the users of government services (or other persons

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contractors. Without such a direct mode of restraint, the public's control over government contractors simply can be too attenuated.

[142] *See, e.g.*, Priebe & Sons, Inc. v. United States, 332 U.S. 407, 411 (1947) (precluding the federal government from collecting liquidated damages from a contractor if they inflict a penalty); *see also* RESTATEMENT (SECOND) OF CONTRACTS *supra* note 90, § 356 ("A [contract] term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."); UCC § 2-718 (1) ("A [contract] term fixing unreasonably large liquidated damages is void as a penalty.").

[143] Even where a government contractor is caught mismanaging its contractual duties, the contractor may not suffer at the hands of the government. For example, the private vendor that mismanaged the federal immigration detention facility in New Jersey reportedly was allowed by the INS, after the riot had subsided and the facility closed down, to transfer its contract with the United States to another company for $6.2 million. *See* Purdy & Dugger, *supra* note 1, at A18. On learning of the transaction, the local congressman remarked, "I think it's the wrong public policy for someone to walk away with $6 million when they haven't done the right thing." *Id.* (quoting Rep. Robert Menendez). Absent some other justification for this result that was not reported in the press, the scenario aptly illustrates the hazards of total reliance upon government oversight of its contractors.

[144] Note, however, that third-party beneficiary claims by private citizens against government contractors are at times circumscribed by legal principles that may preclude such recovery or limit the scope of recoverable damages. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 90, § 313 (disallowing such third-party beneficiary claims against government contractors where they would "contravene the policy of the law authorizing the [government] contract or prescribing remedies for its breach" and stating a general

sufficiently affected) can provide a vital supplement to the government's own efforts at contractor oversight.[145] Compensatory damages alone may be insufficient to deter contractors from wrongful conduct, particularly since a number of injured persons who *could* bring successful tort actions against contractors will choose not to sue, thereby making it less costly overall for the wayward contractor to persist in its wrongs.[146] Punitive damages thus should be included in the panoply of civil remedies recoverable by those injured persons who *do* file suit in order to enhance this ancillary means toward contractor accountability.[147]

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presumption in such third-party cases against the award of consequential damages to a member of the public unless such relief is expressly called for in the contract or is otherwise shown to be consistent with the contract and with public policy). This still leaves room, of course, for private citizens to plead alternative theories against a government contractor, such as tort or the violation of a remedial statute.

[145] Ironically, this is in a sense partially privatizing the government's function of overseeing its own contractors.

[146] *See* David Friedman, *An Economic Explanation of Punitive Damages*, 40 ALA. L. REV. 1125, 1131–35 (1989) (explaining how the transactional costs of litigating punitive damages cases will economically justify increasing the level of punitive damages in those cases that are actually prosecuted).

[147] A parallel accountability mechanism to discourage *fraud* by *federal* contractors is *qui tam* litigation brought by private citizens under the False Claims Act, 31 U.S.C. § 3730 (1996). *See* Erickson v. American Inst. of Bio. Sciences, 716 F. Supp. 908, 909 n.1 (E.D. Va. 1989) (noting that the term "qui tam" is derived from the Latin expression "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," meaning "who brings an action for the king as well as himself"). Subject to various procedural limitations, the False Claims Act authorizes private suits in the name of the United States against parties who have defrauded the federal government, and offers what are, in essence, monetary rewards to private citizens (described as "relators") who successfully prosecute such actions. *See* 31 U.S.C. § 3730 (1996). Those rewards may include, depending upon the circumstances and the government's role (if any) in the litigation, up to 30% of the proceeds recovered from the fraudulent defendant. *See id.* § 3730(d). In such actions the defendant's liability can include treble damages, a civil penalty of up to $10,000 per violation, *id.* § 3729(a)(7), plus the prevailing plaintiff's attorney's fees and costs, *see id.* § 3730(d). Since 1986, when the Act was amended to make it more attractive to potential relators, *see generally* Richard J. Oparil, *The Coming Impact of the Amended False Claims Act*, 22 AKRON L. REV. 525 (1989) (discussing amendments to the False Claims Act), the number of qui tam suits and recoveries have risen dramatically. *See, e.g.*, Paul Reidinger, *Fraud Doctors*, 82 A.B.A. J. 50, 52 (1996) (reporting Justice Department data showing that filed qui tam actions rose from 60 cases in fiscal year 1988 to 221 cases in fiscal year 1994, and that recoveries had climbed from $2 million to $379 million during same period). Just as the specific enhanced recoveries statutorily obtainable by private citizens in *qui tam* litigation can help check fraudulent behavior by federal contractors, so too can the

There is a certain even-handedness in denying government contractors a legal exemption from punitive damages. Such contractors are displacing public agencies that, for reasons noted above, may be comparatively hamstrung by bureaucratic norms in performing the function in question. We have outsourced the function presumably because we expect that the private contractor will do a *better* job at it. The contractor enjoys all the advantages of its private sector status in working to achieve those expected improvements, and is compensated with taxpayer dollars for the effort. But when such a contractor fails to perform its public duty—not by some slight measure, but in an egregious way that conjures up the adjectives (*e.g.*, willful, wanton, outrageous, and the like) that courts use to characterize behavior deserving of punitive damages[148]—we are surely not better off and probably *worse* off. In such instances of proven wrongdoing by a contractor, there is a rough justice obtained in forcing the contractor to bear the brunt of punitive damages, just as it would have to bear them in its private-sector affairs. The defalcating contractor in such a scenario can hardly claim it unfair to be treated as it would normally be treated in a totally private setting. Exposing it to punitive damages is merely asking it to accept a commensurate measure of risk while it is reaping the rewards of public compensation.

Before conclusively endorsing the punitive damages remedy in this context, however, one should ask whether the substantive and fiscal reasons that have traditionally exempted public entities from punitive damages apply perforce to private enterprise acting as government contractors. The answer is no. Punishing a government contractor is not the same as trying to punish the government itself. The private contractor is only a subject of the sovereign. Its assets are privately, not publicly, owned. Those private assets may be attached, through court process, to pay a delinquent court judgment for punitive damages. When its assets are taken for that purpose, the private enterprise suffers a setback in its core mission to accumulate wealth for its owners. That economic mission differs fundamentally from the democratic mission of government.

Retribution is served by singling out a government contractor for its egregious conduct, particularly since that conduct occurred in the course of its duties to the public.[149] The wayward contractor has betrayed the trust of the

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general common law remedy of punitive damages help check fraud and other egregious conduct by contractors at all levels of government.

[148] *See supra* notes 93–101 and accompanying text.

[149] This exemplary aspect parallels criminal sentencing approaches that enhance the penalties for crimes when they are committed by public officials or by private actors engaged in a public function. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL, § 2C1.1 to .7 (setting high severity factors for offenses involving public officials or interference with

public that has come to depend upon its work in an era of privatization. Once that trust is betrayed, there is virtue in having the wrongdoing contractor publicly chastised through a court judgment imposing a sizable financial penalty. The punitive damages award "sends a message" that such patently offensive conduct is to be dealt with severely.

Deterrence also should be more likely to result from imposing punitive damages on a private contractor than where the defendant is a public entity. If the contractor is a for-profit entity,[150] it should be responsive to a legal exposure designed to hit it—and forcefully so—in its pocketbook. The private firm does not enjoy the government's virtually unbounded legal authority to raise tax revenues or to tap treasury reserves. The firm and those who manage it are, in turn, answerable to the firm owners for having to pay a punitive award. General deterrence objectives are also promoted, as other would-be bidders on government contracts witness the harsh punitive sanctions imposed through the courts on other vendors that have behaved wrongfully. In sum, the justifications articulated in *Newport v. Fact Concerts, Inc.*[151] for immunizing public entities from punitive damages simply do not apply to government contractors.

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governmental functions); *id.* § 3B1.3 (providing, inter alia, for an aggravating factor adjustment if the defendant abused a position of public trust); *see also* MODEL PENAL CODE § 240.0(7) (defining "public servant," for purposes of Code provisions on offenses against public administration set forth therein in articles 240–43, to include not only government employees and officers, but also "any person participating as juror, advisor, consultant or otherwise, in performing a governmental function" except for mere witnesses); State v. Vickery, 646 A.2d 1159, 1160 (N.J. Super. 1994) (treating private citizen that was member of the Society for the Prevention of Cruelty to Animals as a "public servant" for purposes of state's official misconduct statute).

[150] As indicated above, *supra* note 30 and accompanying text, my analysis focuses on the more common situation where a for-profit private firm is hired by the government rather than a charitable or nonprofit organization. There will be fewer beneficial incentives created by subjecting nonprofit entities (which are presumably more driven by goals other than financial prosperity) to punitive liability, and more disadvantages flowing from the indirect impact of such penalties on the sponsors and beneficiaries of those organizations. *See* Daniel A. Barfield, Note, *Better to Give Than to Receive: Should Nonprofit Corporations and Charities Pay Punitive Damages?*, 29 VAL. U. L. REV. 1193, 1208–32 (1995) (highlighting problems with imposing punitive damages on charitable and nonprofit organizations but disfavoring extending to such entities immunity from punitives because of countervailing deterrent benefits).

[151] 453 U.S. 247 (1981).

B. *Dealing with Direct and Indirect "Pass-Throughs" of Punitive Liability*

The above analysis is complicated by what can be called the "pass-through" problem. This can arise in at least two ways: direct indemnification[152] of punitive damages by the government agencies that hired the private contractor, or the indirect pass-through of the risks of punitive liability reflected in higher prices bid to undertake the government's work. If the costs of punitive damages are effectively passed on to the government, and ultimately to the taxpayers, the arguments favoring public entity immunity from such damages would seem to be derivatively applicable to government contractors as well. However, for the reasons that follow, the opportunities for such pass-through may at least be limited if not eliminated.

Indemnification of punitive damages as a general matter, whether it be in the private or public sectors, has long been prohibited or disfavored.[153] While this traditional hostility to punitive indemnification has been eroding with new case law and the passage of statutes[154] that legalize insurance coverage for punitive risks, at least fifteen states still ban such coverage in all or most circumstances.[155] The policy reasons disfavoring indemnification for punitive

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[152] At the federal level, there is no legislation that comprehensively provides for the indemnification of government contractors but rather a patchwork of statutes, rules, and practices that authorize indemnities in certain specific contexts. *See generally* Grad, *supra* note 137, at 443–80 (surveying patchwork of indemnity provisions that variously apply to federal providers of military supplies, nuclear energy, space equipment, swine flu vaccine, art exhibits, Superfund cleanups, and other miscellaneous activities).

[153] *See, e.g.*, KEETON ET AL., *supra* note 56, § 2, at 13 (noting that many jurisdictions traditionally found such indemnification would defeat the deterrent and retributive purposes of punitive damages); Michael A. Rosenhouse, Annotation, *Liability Insurance Coverage As Extending to Liability for Punitive or Exemplary Damages*, 16 A.L.R. 4TH 11 (1982) (surveying jurisdictions allowing and disallowing indemnification). *See generally* Alan I. Widiss, *Liability Insurance Coverage for Punitive Damages?: Discerning Answers to the Conundrum Created by Disputes Involving Conflicting Public Policies, Pragmatic Considerations and Political Actions*, 39 VILL. L. REV. 455 (1994) (surveying state law on the invalidity of punitive damages liability coverage and arguing that the availability of such insurance will not substantially diminish the purposes of punitive damages awards).

[154] *See, e.g.*, MONT. CODE ANN. § 33-15-317(1) (1995) (allowing coverage for punitive damages if specifically included in insurance policy terms); N.C. GEN. STAT. § 58-41-50(A) (1994 & Supp. 1995) (allowing insurers to cover, as well as to limit or exclude coverage for, punitive damages); 40 PA. CONS. STAT. ANN. § 2051 (1992) (allowing downhill ski resorts to obtain insurance against punitive damages).

[155] *See, e.g.*, KAN. STAT. ANN. § 40-2,115 (1993); OHIO REV. CODE ANN. § 3937.182 (Anderson 1989); American Ins. Co. v. Saulnier, 242 F. Supp. 257, 260–61 (D. Conn. 1965) (applying Connecticut law); Ruffin v. Sawchyn, 599 N.E.2d 852, 855 (Ohio Ct. App. 1991).

damages are fairly obvious ones. If the aims of punitive damages are to punish and deter civil wrongdoers, those aims are frustrated if the wrongdoer can simply hand off its monetary sanction to an insurance company or to some other indemnitor. The law of punitive damages *wants* the would-be wrongdoer to worry about having to pay such penalties and not to regard it casually as just another cost of doing business.[156]

Government at times has indemnified punitive damages for one class of persons: public employees. The experience here is mixed: at least eight states absolutely prohibit such indemnification,[157] while nine or more allow it,[158]

Other states permit the indemnification of punitive damages only where the liability of the party seeking indemnity was merely vicarious. *See, e.g.*, City Prods. Corp. v. Globe Indem. Co., 151 Cal. Rptr. 494, 496 (Ct. App. 1979); United States Concrete Pipe Co. v. Bould, 437 So. 2d 1061, 1064 (Fla. 1983); Scott v. Instant Parking, Inc., 245 N.E.2d 124, 127 (Ill. Ct. App. 1969); Norfolk & Western Ry. Co. v. Hartford Accident & Indem. Co., 420 F. Supp. 92, 95 (N.D. Ind. 1978) (applying Indiana law); Zurich Ins. Co. v. Shearson Lehman Hutton, Inc., 642 N.E.2d 1065, 1070 (N.Y. 1994); Dayton Hudson Corp. v. American Mut. Liab. Ins. Co., 621 P.2d 1155, 1159 (Okla. 1980); Esmond v. Liscio, 224 A.2d 793, 799 (Pa. Super. Ct. 1966).

[156] Even with indemnification, the tortfeasor may not regard punitive damages exposure so lightly. For one thing, there are the exemplary consequences of being publicly sanctioned, in terms of loss of reputation, corporate image, and the like. The tortfeasor hit with a punitive award covered by insurance may also suffer in the future by having to pay increased premiums for that coverage or find itself unable to obtain future coverage after its loss experience.

[157] *See* ARK. CODE ANN. § 21-9-203 (Michie 1996) (allowing state to only indemnify employee for actual, but not punitive, damages); CONN. GEN. STAT. ANN. § 29-8a (West 1990) (declaring state not liable to indemnify defense costs of state policeman in civil rights action if police officer is found liable for punitive damages); 745 ILL. COMP. STAT. ANN. 10/2-102 (West 1995) (stating that local public entities may not be held "directly or indirectly" liable to pay punitive damages); N.Y. PUB. OFF. LAW § 18(4)(c) (McKinney 1988) (public entities not authorized to indemnify employees for punitive damages); N.D. CENT. CODE § 32-12.2-02 (1995) (state cannot be ordered to indemnify a state employee held liable for punitive damages); S.D. CODIFIED LAWS § 3-22-7 (Michie 1995) (state public entity liability pool fund not liable to indemnify punitive damages claims); *see also* City of West Haven v. Hartford Ins. Co., 594 A.2d 495, 497–501 (Conn. Super. Ct. 1990) (interpreting Connecticut law as prohibiting public entity's indemnification of punitive damages imposed on one of its employees, the court observing that "[t]he very nature of punitive damages makes it inappropriate to require [a] municipality to assume the burden"); Sharapata v. Town of Islip, 437 N.E.2d 1104, 1107 (N.Y. 1982) (deciding that a legislative ban on government indemnification of punitive damages guards against "unwarranted invasion of the public purse").

[158] *See* CAL. GOV'T CODE § 825(b) (West Supp. 1995) (authorizing public entities other than the state to indemnify employee for punitive damages if governing body finds in its sole discretion that employee acted within scope of duties, in good faith, without actual malice,

usually on a discretionary basis.[159] Several justifications may be advanced for permitting such indemnification of public employees on a case-by-case basis.

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and in the apparent best interests of the public entity); COLO. REV. STAT. § 24-10-118(5) (1988) (vesting public entity's governing body with discretion to pay or settle punitive damages claims against one of its employees if it determines, after an open public meeting, that such payment is in the public interest); KAN. STAT. ANN. § 75-6116 (1989) (notwithstanding the fact that public employees in Kansas are generally precluded from being indemnified for punitive damages, statute authorizes such indemnification on a discretionary basis in cases involving alleged civil rights violations); MD. CODE ANN., CTS. & JUD. PROC. § 5-403(c)(2) (1995) (allowing local government to indemnify employee for punitive damages, except for certain conduct involving law enforcement officers); MINN. STAT. ANN. § 466.07 (West 1994) (requiring municipality to indemnify employee liable for punitive damages, provided that employee acted in performance of official duties and was not guilty of malfeasance in office, willful neglect of duty, or bad faith); N.J. STAT. ANN. §§ 59:10-1, 10-4 (West 1992) (allowing state to indemnify state employee for punitive damages if, in the opinion of the Attorney General, the acts committed by the employee did not constitute actual fraud, actual malice, willful misconduct, or an intentional wrong; local public entities may indemnify their employees for punitive damages upon making similar findings); N.M. STAT. ANN. § 41-4-4 (Michie 1995) (*obligating* governmental entity to indemnify employee for punitive damages based on federal law or law of other state, if the public employee was acting within the scope of duties); OHIO REV. CODE ANN. § 9.87(B)(3) (Anderson 1990) (allowing state to indemnify employee for punitive damages upon finding by Attorney General that employee acted within scope of duties, without malicious purpose, bad faith, or in a wanton or reckless manner); UTAH CODE ANN. § 63-30-22 (1993) (establishing state fund for claims against public entities *obligated* to indemnify public employee for punitive damages if employee was acting within scope of duties, without fraud or malice, and not while under influence of drugs or alcohol). Iowa takes a compromised approach, precluding municipalities from directly indemnifying against judgments for punitive damages, but authorizing governing bodies to purchase insurance for their employees and officers that would cover such exposures. *See* IOWA CODE ANN. § 670.8 (West Supp. 1996).

[159] In some states the issue of employee indemnification does not arise much because punitive damages are statutorily nonrecoverable from public employees in state law tort actions. *See* ARIZ. REV. STAT. ANN. § 12-820.04 (1992); IDAHO CODE § 6-918 (1996); 745 ILL. COMP. STAT. ANN. 10/2-213 (West 1982) (employees of local public entities not liable for punitive damages); MD. CODE ANN., CTS. & JUD. PROC. §§ 5-321, 5-322, 5-323 (1995) (declaring punitives nonrecoverable from municipal and county officials in contract actions); MISS. CODE ANN. § 11-46-15 (Supp. 1996) (disallowing punitive damages awards against state and local employees); NEV. REV. STAT. ANN. § 41.035(1) (Michie 1996) (no punitive damages against public officials acting within scope of their employment); OR. REV. STAT. § 30.265(1) (1988) (requiring tort actions against public employees to be brought exclusively against the public agency if arising out of employee's scope of public employment); W. VA. CODE § 29-12A-7 (1992) (no punitive damages recoverable against employees of political subdivisions); WIS. STAT. ANN. § 893.82(6) (West Supp. 1995) (punitive damages unrecoverable from state employees). Federal law, however, might still expose such public

One reason is to allow the executive branch of government that employs the defendant civil servant a chance to rectify an aberrational judicial award of punitives that it finds, on further examination, to be truly unfair or contrary to the public interest. Since the government agency might be required by law or union contract to finance an appeal by that government worker of an unjustified punitive award, there is merit in allowing the agency to save time and expense by paying the plaintiff the award (or a negotiated compromise of it) in lieu of such an appeal.

The recruitment, retention, and morale of talented public employees also can be enhanced by allowing government some leeway to spare its workers from the financial hardship of an aberrational punitive damages award. Because they are often engaged in highly visible services for the general public, civil servants can be disproportionately targeted in lawsuits brought by disgruntled citizens. Such lawsuits often include claims for punitive damages.[160] At times those lawsuits are unjustified, but can take years or months before they are dismissed. Given the special vulnerability of public employees to such litigation, there is some justification in allowing the government to tell its workers: "We will stand by you if we find that you were truly acting properly within the scope of your duties."[161]

When the defendant is a business enterprise contracted by the government to carry out a particular task rather than an individual public employee, the equitable reasons that may justify the occasional indemnification of a government worker from punitive damages seem less palpable. The contractor may well have many other customers. If it does, the contractor would not have the same dependency on the government as do individual civil servants who often devote their careers to public service. Conceivably, a private enterprise qualified to take on the government's work might be more interested in bidding for that work if it can be assured that it will have the government's indemnity

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employees to punitive damages liability, such as in civil rights actions under 42 U.S.C. § 1983 (1994). *See supra* note 125.

[160] Some procedural measures have been adopted to minimize the chances that a jury might peg punitive damages against an indemnifiable public employee at an excessive figure, in the expectation that a deep-pocket government agency will be picking up the tab. Under the California indemnification scheme, for example, the jury may not be told that a public entity may be paying all or part of a punitive award against one of its employees, nor can the plaintiff in such a case put on proofs revealing the extent of the public entity's assets. *See* CAL. GOV'T CODE § 825(b)(3) (West Supp. 1996); *see also* KAN. STAT. ANN. § 75-6116(d) (1989) (prohibiting disclosure at trial of possibility that governmental entity may pay punitive damages on behalf of its employee sued for civil rights violations).

[161] However, punitive indemnification of public employees should not be automatic, lest the retributive and deterrent purposes of those sanctions be forsaken in those instances where they are justified.

protection from punitive damages.[162] Nevertheless, there normally should be sufficient incentives for enough private firms to enter into government contracts without making them such extraordinary promises, particularly since those firms are already facing punitive damages exposures in their regular private sector work. Moreover, the argument that punitive damages exposure might discourage companies from bidding on public contracts also would logically extend to the similarly discouraging impact of enforcing criminal laws against government contractors. Yet there surely is no reason to immunize such companies from penal statutes forbidding corruption, theft, and the like on

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[162] Both the majority and the dissenting opinions of the Supreme Court in *Board of County Commissioners v. Umbehr*, 116 S. Ct. 2342 (1996) and *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996), the recent companion cases extending to government contractors First Amendment protections from political patronage-based procurement decisions, expressly recognized that there are some qualitative differences between government employees and independent contractors hired by the government. *See Umbehr*, 116 S. Ct. at 2348 (recognizing that independent contractors "work at a greater remove from government officials than do most government employees" and that such contracts generally do "not give the government the right to supervise and control the details of how work is done"); *O'Hare*, 116 S. Ct. at 2359 ("It is true that the distinction between employees and independent contractors has deep roots in our legal tradition and often serves as a line of demarcation for differential treatment . . . .") (citation omitted). Consider also Justice Scalia's following observations in his dissent in *Umbehr*:

> A public employee is always an individual, and a public employee below the highest political level . . . is virtually always an individual who is not rich; the termination or denial of a public job is the termination or denial of a livelihood. A public contractor, on the other hand, is usually a corporation; and the contract it loses is rarely its entire business, or even an indispensable part of its entire business.

Umbehr, 116 S. Ct. at 2366 (Scalia, J., dissenting). The Justices split in *Umbehr* and *O'Hare* on whether those various factual distinctions *constitutionally* justified treating private contractors differently from public employees when they are terminated or denied government work for purely political reasons. The majority in both cases concluded that government contractors, in spite of their differing characteristics that are important for common law purposes, nonetheless deserve the same First Amendment protection from patronage as do regular government employees. *See Umbehr*, 116 S. Ct. at 2348–49. As Justice O'Connor stated for the majority, "Independent contractors appear to us to lie somewhere between the case of government employees, who have the closest relationship with the government, and our other constitutional conditions precedent [cases], which involve persons with less close relationships with the government." *Id.* at 2350. The Court's observations reinforce my own point: government contractors are not the same in all respects as the government itself, nor are their workers identical to full-time government employees. The differences, I submit, justify treating such contractors unlike public entities and public employees when it comes to their susceptibility to punitive damages.

public jobs. If anything, there is a greater need for such legal constraints given the opportunities for contractors to take advantage of their position.

On balance, the pass-through problems associated with directly indemnifying government contractors for punitive damages seem to outweigh the potential justifications for such indemnity, at least as a general matter.[163] This sort of indemnification should not be a contractual entitlement that is routinely included in procurement agreements. If private vendors are regularly afforded such a contractual promise of punitive indemnity, their fiscal incentives to refrain from the kind of egregious behavior that will trigger such damages practically evaporate. Accordingly, the law should deem such punitive indemnity promises unenforceable as a matter of public policy.[164] Rather than allowing punitive indemnification to be bargained for as a matter of contractual entitlement, the law instead should repose in high level executive branch officials (such as, for example, an Attorney General, Comptroller, or an entire local governing body) limited, nondelegable discretion to indemnify government contractors from a docketed civil judgment of punitive damages only where they make specific findings that such indemnification is in the public's best interests.[165] This approach leaves open a window of opportunity

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[163] In federal contracts, "there is generally no [indemnification] coverage for losses or claims caused by willful misconduct or lack of good faith on the part of the contractor." Grad, *supra* note 137, at 478; *cf.* Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. § 9619(c)(1) (1994) (denying indemnification to environmental response action contractors where liability resulted from the contractor's gross negligence or by intentional misconduct); Exec. Order No. 10,789, 23 Fed. Reg. 8897, § I(1A)(b)(2), *reprinted in* 50 U.S.C. § 1431 (1994) (prohibiting United States from contractually agreeing to indemnify national defense contractors for claims or losses caused by willful misconduct or a lack of good faith). Such exclusion of instances of "misconduct," "bad faith," and "gross negligence" from the ambit of federal indemnification loosely approximates the traditional common law standards for awarding punitive damages. *See supra* notes 93–101 and accompanying text.

[164] The notion of denying government contractors indemnification of certain categories of exposures for policy reasons is not a new one. For example, in *Stencel Aero Eng'g v. United States*, 431 U.S. 666 (1977), the Supreme Court declared invalid indemnification claims asserted against the United States by military contractors that had been found liable in private litigation to service personnel injured by the contractor's equipment. The Court's analysis in *Stencel* hinged upon the same congressionally adopted policy reasons that the Court had previously sustained in *Feres v. United States*, 340 U.S. 135, (1950): *i.e.*, that the government ought not be liable in the courts to bear the costs of military accidents that injure its own soldiers, sailors, and pilots. *See Stencel*, 431 U.S. at 673. The Court also expressed concern that the indemnification of such serviceman claims would disrupt military discipline. *See id.* at 673.

for corrective action from aberrational punitive awards that are not (or not yet) rectified by the judiciary without unduly sacrificing the accountability goals that are furthered in general by exposing government contractors to punitive liability.

The problem of *in*direct pass-through of punitive damages—a problem which flows from an assumption that bidders on government contracts will jack up their prices to take into account the risks of future unindemnified punitive damages liability—is a harder one to uncover and to address. The risks of punitive liability are not easily quantified, and the extra sum that a bidder would charge for bearing that risk will be virtually impossible to segregate out of its overall bid price. Accepting the premise, however, that economically rational bidders will in some way, *ex ante*, factor such risks into their prices, there still may be ways to limit the extent that taxpayers would ultimately absorb the costs of punitive damages assessed against government contractors.

The procurement process itself offers one avenue to guard against such indirect pass-through of punitive damages. All other things assumed equal, a more vigilant private firm that stimulates its employees to adhere to basic legal norms and to refrain from the kind of outrageous behavior that can trigger punitive damages will be able to underbid competing firms that are more prone to such liabilities.[166] Additionally, recidivist firms with a track record of being repeatedly held liable for punitive damages on account of a number of instances of wrongful conduct might also be debarred, suspended, or otherwise disqualified (or given lesser preference in discretionary bidding scenarios) from obtaining government contracts.[167] Such past experiences or misconduct may

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[165] The statutory provisions in New Jersey and Ohio that vest the Attorneys General of those states with narrow discretion to indemnify public employees for punitive damages offer useful models in this regard. *See supra* note 158.

[166] By way of illustration, suppose that private firms "A" and "B" are bidding on a government contract. Disregarding punitive damages for the moment, assume that Firms A and B would each perform the contract for the same baseline costs of *X* dollars. Suppose further that Firm B, because of its overall methods of doing business, is more prone than Firm A to engage in the sort of wrongful conduct that would warrant punitive damages liability and that the extra costs associated with that differential in punitive risk are quantified at *Y* dollars. Lastly, assume that both Firms A and B would need a profit margin of *Z* dollars to be motivated to take on the contract. In this "equal-baseline costs" scenario, Firm A should prove to be the low bidder on the contract because its total costs ($X + $Z) are less than those for Firm B ($X + $Y + $Z).

[167] For example, a federal acquisition regulation, FAR 9.104-1(d), states that a prospective contractor with the United States must have "a satisfactory record of integrity and business ethics." 48 C.F.R. § 9.104-1(d) (1995). The regulation does not define the term "integrity," but has been successfully invoked at times by the government to disqualify bidders with a past record of serious criminal or statutory violations. *See generally* MCBRIDE,

bespeak a lack of integrity or responsibility on the part of the bidding firm. Further, a punitive damages award levied against an existing vendor could provoke an otherwise complacent government agency to respond by terminating (to the extent permitted, of course, under the terms of the contract) that vendor, thereby depriving the vendor of the full anticipated benefits of its business relationship with the government.

One possible consequence of these suggested measures to constrain the pass-through of punitive damages liability is that some private firms may refuse to bid on work for the government because they do not want to bear such punitive risks. A related possibility is that they will bid only at much higher prices to account for those risks. In either scenario, the government may find that it is not feasible to contract out the work, or that government can do the work more cheaply in-house by virtue of its immunity from punitive damages. Such outcomes, however, do not thwart public policy. Privatization, which is often pursued to save the taxpayers money, can only be in the public interest if the firms hired by government are held accountable for their work. If the price of that accountability makes contracting out a government function to private firms too expensive, then perhaps that function should not be privatized in the first place. A seemingly low bid on a contract for public services could mask a bidder's proclivity to perform those services in a slipshod manner.[168] By

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supra note 9, §§ 10.190, 10.200, 10.240, and cases cited therein. Likewise, the FAR also requires bidders to have "a satisfactory performance record." 48 C.F.R. § 9.104-1(c) (1995). Accordingly, deficient past performance also can disqualify a prospective bidder. *See* MCBRIDE, *supra* note 8, § 10.190 and cases cited therein. In February 1997, Vice President Gore announced that federal regulations would soon be issued that, for the first time, would disqualify certain companies that have engaged in past labor law violations from bidding on federal contracts. *See* Steven Greenhouse, *Gore Informs Labor of New Restrictions on U.S. Contractors*, N.Y. TIMES, Feb. 19, 1997, at A1. In the same vein, a firm that has been repeatedly held liable for punitive damages to persons that it injured in its past work for government agencies conceivably might be deemed to lack sufficient integrity or a "satisfactory performance record" to enable it to bid on new public contracts.

[168] Whether such a contractor that runs its operations more cheaply than its competitors will actually obtain the government's business may depend on the magnitude of that contractor's proclivity to be held liable for punitive damages. Returning to the hypothetical previously posed, *see supra* note 166, suppose that Firm B's costs of performing the contract are $\$W$ less than the costs that Firm A would incur ($\$X$) if awarded the government contract. Again, presume that both firms would want to make the same amount of minimum profit ($\$Z$) on the contract. If the risks of punitive damages are ignored, then Firm B would be the low bidder, because its total price ($\$X + \$Z - \$W$) would be less than Firm A's total price ($\$X + \$Z$). However, if Firm B is more prone to engage in conduct that would justify punitive damages than Firm A, Firm B's apparent price advantage over Firm A will lessen and might even disappear. If, for example, we again assign the sum of $\$Y$ to the enhanced punitive risk associated with Firm B, then Firm B's total price would be $\$X + \$Z - \$W + \$Y$, while Firm

refusing to immunize or indemnify government contractors from punitive damages, we can better evaluate the costs and benefits of privatizing public services—with a decision calculus that does not forfeit the public's vital interest in accountability.

Even if some degree of fiscal pass-through of punitive liability costs to taxpayers is inevitable, the exemplary potential of such awards should not be underestimated. Private firms doing business with the government, particularly through contracts that attract substantial public attention because of their size or the visibility of the service provided, should loathe the adverse publicity engendered by a punitive damages award. Such verdicts can tarnish the

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A's price would remain at $X + $Z. Whether Firm B would still be the low bidder would thus depend upon whether the savings that it can achieve over Firm A in its performance costs ($W) are greater than the extra sum that it must charge ($Y) to take into account its higher propensity to be liable for punitive damages. In some instances (*i.e.*, where $Y exceeds $W), Firm B will need to charge a higher overall price than Firm A to take into account its greater risks of punitive exposure. Even in those instances where Firm B would still be the low bidder (*i.e.*, where $W exceeds $Y), the "spread" between its price and Firm A's price may narrow to such a degree that the government may choose to opt for Firm A over Firm B, at least in procurement scenarios where the agency has the legal discretion to make an award based on other factors in addition to price.

In offering these simplified hypothetical calculations that attempt to factor punitive damages into the mix of price considerations for government procurement, I am mindful of the descriptive and prescriptive limits of any economic analysis. *Compare* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (3d ed. 1988) (explaining and extolling the virtues of the application of economic principles to legal reasoning) *with* Frank J. Vandall, *Judge Posner's Negligence-Efficiency Theory: A Critique*, 35 EMORY L.J. 383 (1986) (identifying various problems with applying economic theory to tort law, including, inter alia, economic assumptions about human values, market externalities, transactions costs, and wealth maximization motives) *and* C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 48 (1975) (criticizing law and economics methodologies as "biased in favor of the rich and productive, exploitative claimants"). Indeed, it may be misleading to assume in my hypothetical that both Firm A and Firm B will "perform" a government contract on an equally satisfactory basis when Firm B is more apt than Firm A to engage in egregious conduct that injures members of the public while doing that outsourced work. The notion of competent performance by a government contractor ideally should include an expectation that the provider will not willfully, wantonly, or otherwise abusively treat the citizens that it is supposed to be serving. As noted above, however, the government agency that hires the contractor may fail to assure such results through its contract negotiation and oversight efforts. That shortcoming justifies giving the public consumers of the outsourced function a degree of economic leverage to curtail such contractor abuses. Through the court's imposition of punitive damages, a government vendor that adopts an indifferent "we're-going-to-take-the-cheapest-way-out" attitude, such as the defendant road contractor in *Lemond Construction, Co. v. Wheeler*, 669 So. 2d 855, 863 (Ala. 1995), may forfeit any competitive edge it would have enjoyed over other more responsible bidders. *See supra* note 6

enterprise's public image, potentially diminishing its relations with its investors, its other customers (especially those in the public sector), and its employees. A publicized verdict for punitive damages against a government contractor might also stimulate other litigation against the firm if it has committed similar misconduct in its private business. In turn, the government contractor may well choose to be more careful in conforming its activities to the boundaries of the law, whether it is working in the public or private sectors. These compliance benefits are desirable on their own accord, even if taxpayers do end up directly or indirectly defraying a chunk of the contractor's punitive damage exposures.

This is by no means to suggest that punitive damages are an antidote to all of the accountability problems raised by privatization. As acknowledged above, the law of punitive damages has not been uniformly administered in practice with constitutional, let alone scientific, precision. Civil juries and judges at times will over-penalize less insidious conduct and under-penalize more egregious behavior. Some contractors may be indifferent to the threat of punitive liability, despite rational incentives for them to avoid such costs by behaving responsibly. Moreover, the government may fail in the procurement process to protect the public treasury sufficiently from the pass-through of punitive exposures.

In spite of these imperfections, punitive damages liability can aid in the massive task of monitoring public services rendered by private contractors. We would be mistaken to rely on the government alone to watch over important outsourced functions for the public at large. Opponents of privatization should take some solace in keeping such a monitoring device in the hands of the citizens who regularly use or deal with a privatized service. Proponents of privatization, on the other hand, should recognize that exposing government contractors to punitive damages simply is treating such private firms in the same fashion that they are treated under the law when they are working in the private sector. And since punitive damages are, by definition, to be imposed only for the most egregious forms of misconduct, the remedy should not unduly tie the hands of law-abiding government contractors in their efforts to experiment *responsibly* with ways to conduct public services more efficiently.

V. CONCLUSION

As we continue to sort out which activities of modern government can and should be privatized through contracts and how best to accomplish such privatization, we must bear in mind the importance of overseeing the private firms that step in to handle those public functions. Those firms are engaged, after all, in the people's business, even if their economic mission is to earn profits while doing so. Monitoring by government itself is not likely to prove

sufficient to keep public contractors accountable. The government's efforts to police its contractors should be augmented by the members of society who are affected by the work of those contractors. If a government contractor causes harm by deviating from societal norms, then it ordinarily should be held accountable in the courts to the persons that it has injured.

To advance these ends, those who are injured by willful, wanton, or other extreme misconduct by a government contractor should be allowed to obtain not only compensatory redress, but also the well-established civil remedy of punitive damages that is designed to punish and deter such wrongful behavior. The status-based immunity that traditionally shields most public entities from punitive damages should not be stretched further to immunize government contractors likewise from exemplary liability. Nor should the government routinely indemnify its contractors from those exposures. Instead, the usual rules of law that can make egregious private actors literally pay for their wrongdoing with a civil sanction also should be applied to private actors when they flagrantly cause harm to others while under contract to the government. That is the proper role of punitive damages. By leaving such exemplary measures intact, we shall increase the chances in an era of privatization that government contractors will honor their obligations to the state, and, as importantly, to the public that they were hired to serve.